NAVAL WAR COLLEGE

International Law Situations

WITH SOLUTIONS AND NOTES

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PREFACE

This volume of International Law Situations for 1933 has, as in recent years, been prepared by George Grafton Wilson, LL.D., professor of international law at Harvard University. It covers topics upon which opinion has been changing and which have been the subject of discussion by the War College Class of 1934. The method followed has been to propound situations for consideration by the officers, members of the class, and after critical discussion to organize the material for publication. The conclusions reached are in no way authoritative but the notes afford a convenient survey of the course of thinking upon the subjects presented in the situations.

In order to increase the usefulness of this publication, criticisms and suggestions covering timely topics for discussion will be welcomed by the War College.

L. McNamee,
Rear Admiral United States Navy,
President Naval War College.

June 30, 1934.

CONTENTS

	Page
SITUATION I.—Contraband and blockade	1
Solution (*a*) and (*b*)	1
Notes:	
Earlier discussions of contraband	1
Early attitude toward contraband	2
Opinion of Grotius	4
Attitude of United States	5
American treaties and contraband	6
Declaration of London lists, 1909–13	7
Early World War changes in contraband lists	10
Disappearance of contraband distinctions	16
The *Kim* and three other ships, 1915	20
Destination	21
Direct interference with neutral trade	22
Exempt articles	23
Hospital supplies	23
Contraband distinctions	25
Early blockades	28
Declaration of Paris, 1856	28
Declaration of London and blockade	29
American views	30
World War discussions	31
Proclaimed blockades in World War	36
Export prohibitions and embargoes	37
Belligerent embargoes	38
Retaliation	39
Retaliation measures, 1914	41
Summary	44
Solution (*a*) and (*b*)	45
SITUATION II.—Independent Philippine Islands	47
Solution	47
1. (*a*), (*b*), (*c*), and (*d*)	47
2. (*a*), (*b*), (*c*), and (*d*)	48
Notes:	
Independence of Philippine Islands	48
Independence and neutralization	49
Neutralization agreements	49
Neutralization	49

SITUATION II.—Independent Philippine Islands—Continued
Notes—Continued Page
Belgian position, 1914 51
Neutralization of the Philippine Islands 54
American commitments in the Philippines 55
Neutralization of Panama Canal 56
Neutralization of Aaland Islands, 1921 57
Civil and military aircraft 58
Seaplanes and neutral waters 59
German protest to United States, 1915 61
Analogy of aerial and maritime rules 62
Due diligence as to aircraft 63
Naval War College opinion, 1912 63
Hague rules, 1923 64
Dependent aircraft 65
Aircraft over neutral jurisdiction 66
Internment 67
Aircraft and outbreak of World War 67
Proclamation of United States, February 28, 1918 68
Spaight's opinion 68
The 24-hour rule 69
Résumé 70
Solution 72
1. (*a*), (*b*), (*c*), and (*d*) 72
2. (*a*), (*b*), (*c*), and (*d*) 72
SITUATION III.—Straits in peace and war 73
Solution 74
1. In time of peace: (*a*), (*b*), and (*c*) 74
2. In time of war: (*a*), (*b*), and (*c*) 74
Notes:
Strained relations 74
The Pact of Paris 75
Self-defense and treaties 78
Maritime jurisdiction in general 79
Maritime jurisdiction, customs 80
Straits 82
Jurisdiction over straits 84
Black Sea Straits 84
Straits of Magellan 86
Decrees of Chile, 1914 87
League of Nations Committee and straits 88
Comments on proposed Article 6 89
International Law Association, 1926 89
Japanese Branch of the International Law Association 90

SITUATION III.—Straits in peace and war—Continued
Notes—Continued Page
Closure of ports 91
Closure of straits 92
Declaration of war 92
Reasons for declaring war 94
Brazilian rules, 1933 94
Opening of hostilities 95
Making Hague Convention III, 1907 97
Radio in time of peace 98
Radio in war 99
Mine laying 99
Mines in World War 100
Proposals of the United States, 1915 104
Summary of the attitude of the United States 105
Résumé 107
Solution 108
1. In time of peace: (*a*), (*b*), and (*c*) 108
2. In time of war: (*a*), (*b*), and (*c*) 108
Appendixes:
1. Convention to Frame Constitution for Philippine Islands. Janary 17, 1933 111
2. Convention to Frame Constitution for Philippine Islands. March 24, 1924 127

SITUATION I

CONTRABAND AND BLOCKADE

States X and Y are at war. Other states are neutral.

(*a*) State X declares that all distinction between conditional and absolute contraband is abolished and that all goods bound for Y will be treated as contraband.

(*b*) State Y declares all ports of X blockaded and maintains a line 3 miles off the coast of state D to prevent vessels passing up the river Dana which is the sole navigable waterway through state D to the capital of state X.

What are the rights of the belligerents and of the neutrals?

SOLUTION

(*a*) State X may declare all distinction between absolute and conditional contraband abolished, but this does not make all goods contraband nor does it give to state X a right to treat all articles bound for Y as contraband.

(*b*) State Y may not lawfully maintain a blockade of the ports of state X to which there is access only through a navigable river of neutral state D; nor may state Y prevent vessels from entering the river Dana, though it may seize vessels outside neutral jurisdiction when transporting prohibited goods having an ultimate enemy destination.

NOTES

Earlier discussions of contraband.—Contraband has often been the subject of discussion at the Naval War

College in past years.[1] From these discussions it will be evident that opinions of different states have from time to time changed. In general, though not in every case, belligerents have been inclined to extend the list of contraband and neutrals have endeavored to restrict the list. When the maintenance of blockade is easy, the contraband list might be short; and when blockade was difficult or impossible, the list would be extended. The idea of contraband is so old that there are many examples of diversity in practice.

Early attitude toward contraband.—The word contraband, Latin *contrabandum*, implied disregard of a decree or prohibition. The word was used in early times in deferring to domestic restrictions usually upon trade in named articles as in regard to trade in salt which often was a government monopoly. Later prohibitions were issued restricting within specified areas trade in materials which might be of use in war.

The prohibition on export of arms, an idea receiving particular attention again in the twentieth century, was common in Roman and Byzantine periods when it was extended to supplies which might be serviceable to possible enemies. At times religious penalties were prescribed by the early church for those who furnished war materials to infidels. In these instances the measures taken were domestic or applied to those under the authority of the source of the prohibitions and the prohibitions might be applied both in time of peace and in time of war. Kings of England in the fourteenth century issued prohibitions, sometimes in regard to furnishing articles to nationals of named states and sometimes in regard to furnishing specified articles to any foreigner. England also made treaties in this century prohibiting the supplying of specified articles under penalty of forfeiture to the king (Edward III, 1370).

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[1] For references, see General Index to International Law Situations, Topics, Discussions, Documents, and Decisions, Vols. I to XXX, 1901–30.

Gradually the prohibitions aimed at regulating domestic trade began to extend to the activities of foreign merchants in time of war. This extension created the demand that for the security of traders the list of prohibited areas should be made known either by previous treaty agreement or by special proclamation, and such action became usual from the seventeenth century. The early enumerations were not based on any uniform principle but were often determined by political or other motives.

It was easy to extend the domestic prohibition of furnishing certain goods to certain areas or to infidels by analogy to the furnishing of such goods to enemies. As belligerents would have no authority over acts of traders within neutral jurisdiction, they began to seize goods of the nature of contraband when these were outside of the immediate control of the neutral state, as in transit on the high sea. Here there would be a degree of conflict between the rights of the neutral to protect the shipping under its national flag and the right of the belligerent to prevent the delivery to his opponent of goods which might be used for his defeat or injury. The right of the belligerent was to a degree gradually conceded as dominant over the right of the neutral trader, and the belligerent assumed the right to enumerate by proclamation, or otherwise to determine, what should be regarded as under the ban.

The furnishing of contraband was, at first, regarded as an act for which the state should be held responsible. Gradually the problem of supplying of contraband by subjects of neutral states gave rise to controversies. Attempts were made to extend to states responsibility for acts of their subjects. The discussions of these topics were often by theologians because prohibitions had been against furnishing contraband to infidels and the course of argumentation differed from modern discussions though involving like principles. This was especially true of the fourteenth and fifteenth centuries.

In a posthumous book of Gentilis (1552–1608), the mingling of the modern and earlier attitude is shown. The negative aspect of the Golden Rule "that one should not do unto others what he would not that they should do to him" was emphasized. Gentilis quotes the civil laws:

"Let no one have the power to transport wine, oil, or any liquid to heathendom even to give them a taste, to say nothing of satisfying the demands of trade." "Let no one dare to sell to alien heathen * * * coats of mail, shields, bows, arrows, broadswords, swords, or arms of any other sort whatsoever. Let absolutely no weapons be retailed to them by anyone, and no iron at all, whether already made up or not, for it would be harmful to the Roman Empire, and would approach treason to furnish the heathen, who ought to be without equipment, with weapons to make them stronger. But if anyone shall have sold any kind of arms anywhere to alien heathen of any nation whatsoever in violation of the interdicts of our holy religion, we decree that all his goods be straightway confiscated, and that he too suffer capital punishment." (Gentilis, Hispanicae Advocationis, Bk. I, Chap. XX.)

Gentilis extends these principles in the sixteenth century and takes up many of the questions arising from destination, proportion, and ownership of the cargo.

The neutral began to demand that the evidence that the trade would be dangerous to the belligerent must also be clear not only from the nature of the goods themselves which might, if going to another neutral, be innocent, but that the goods if liable to capture must have an enemy destination. The nature of the goods and the destination thus became early determining factors in liability for contraband.

Opinion of Grotius.—Grotius (1583–1645) in his epoch-marking book, *De jure belli ac pacis*, 1625, looking backward and surveying earlier practices, said:

But there often arises the question, What is permissible against those who are not enemies, or do not want to be called enemies, but who furnish our enemies with supplies? For we know that this subject has been keenly debated in both ancient

and modern times, since some champion the relentlessness of warfare and others the freedom of commercial relations.

First, we must make distinctions with reference to the things supplied. There are some things, such as weapons, which are useful only in war; other things which are of no use in war, as those which minister to pleasure; and others still which are of use both in time of war and at other times, as money, provisions, ships, and naval equipment. (Carnegie Endowment for International Peace, Grotius, "De Jure Belli ac Pacis", Vol. II, Book III, Chap. I, V, p. 601.)

In this chapter Grotius shows how questions in regard to these three classes of goods have been regarded both in early practice and in law. He quotes Seneca (3 B.C.–65 A.D.):

Money, by means of which a satellite may be kept in service, I shall not supply. If he shall desire marbles and robes, that which his luxurious taste amasses will harm no one; soldiery and arms I shall not furnish. If, as a great favour, he seeks craftsmen of the stage and things which may soften his savagery, I shall gladly proffer them. To him to whom I would not send triremes or ships with bronze rams, I shall send pleasure craft, and sleeping-barges, and other follies of kings who revel on the sea. "On Benefits", VII, xx. Car (Ibid, p. 602).

Grotius set out also that the practices had not been consistent among different states or at different times in the same state.

Attitude of United States.—Even before the American colonies became independent, the matter of treatment of goods of the nature of contraband was considered in the Continental Congress. (III Journals 371–375, 437; IV Ibid, 229–232; 253–254; V Ibid, 768.) Some of these documents use the word contraband and refer to "prohibited or contraband goods." In general during the eighteenth century the doctrine of "free ships, free goods, except contraband of war" met with growing favor and many added "free goods always free."

The lists such as in the treaty with France, February 6, 1778, vary, but cover most of the articles later included in the categories of absolute and conditional contraband though no such distinction is there made.

The instructions issued in 1780 to commanders of private armed vessels having commissions or letters of marque and reprisal enjoined them to take care "not to infringe or violate the laws of nations, or the laws of neutrality", and not to interfere with vessels of allies unless they were "employed in carrying contraband goods or soldiers to our enemies."

American treaties and contraband.—The United States entered into about 25 treaties containing provisions relating to contraband during the nineteenth century. Some of the treaties provided that "in general, whatever is comprised under the denomination of arms and military stores, of what description soever, shall be deemed objects of contraband." (Prussia, 1828.) Others, as the treaty with Brazil, 1828, specifically enumerated contraband.

ARTICLE XVI. This liberty of commerce and navigation shall extend to all kinds of merchandises, excepting those only which are distinguished by the name of contraband; and under this name of contraband or prohibited goods shall be comprehended—

1st. Cannons, mortars, howitzers, swivels, blunderbusses, muskets, fuzees, rifles, carbines, pistols, pikes, swords, sabres, lances, spears, halberds and grenades, bombs, powder, matches, balls and all other things belonging to the use of these arms.

2d. Bucklers, helmets, breast plates, coats of mail, infantry belts and clothes made up in the form and for a military use.

3d. Cavalry belts, and horses with their furniture.

4th. And generally all kinds of arms and instruments of iron, steel, brass and copper or of any other materials manufactured, prepared and formed expressly to make war by sea or land.

ARTICLE XVII. All other merchandise and things not comprehended in the articles of contraband, expressly enumerated and classified as above, shall be held and considered as free and subjects of free and lawful commerce, so that they may be carried and transported in the freest manner by both the contracting parties, even to places belonging to an enemy, excepting only those places which are at that time besieged or blockaded; and, to avoid all doubt in this particular, it is declared that those places are only besieged or blockaded which are actually attacked by a force capable of preventing the entry of the neutral. (8 U.S. Statutes, Part II, pp. 390, 394.)

Other treaties with South American states contained similar provisions.

Declaration of London lists, 1909–14.—Early in the World War the belligerents showed a disposition to adopt the list as set forth in the unratified Declaration of London of 1909. The list of absolute contraband was,

(1.) Arms of all kinds, including arms for sporting purposes, and their unassembled distinctive parts.

(2.) Projectiles, charges, and cartridges of all kinds, and their unassembled distinctive parts.

(3.) Powder and explosives specially adapted for use in war.

(4.) Gun-carriages, caissons, limbers, military wagons, field forges, and their unassembled distinctive parts.

(5.) Clothing and equipment of a distinctively military character.

(6.) All kinds of harness of a distinctively military character.

(7.) Saddle, draught, and pack animals suitable for use in war.

(8.) Articles of camp equipment, and their unassembled distinctive parts.

(9.) Armor plates.

(10.) Warships and boats and their unassembled parts specially distinctive as suitable for use only in a vessel of war.

(11). Implements and apparatus made exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or of military material for use on land or sea. (1909 Naval War College, International Law Topics, p. 59.)

This list of absolute contraband was the same as that upon which agreement had been reached at the Second Hague Peace Conference in 1907.

The subject of conditional contraband was considered at the same conference but "lack of time and the complication of interests involved did not admit of the elaboration at present [1907] of a text adopted by all." (1 Proceedings of the Hague Peace Conference, p. 259.) At this Second Peace Conference, the American naval delegate, Admiral Sperry, former president of the Naval War College, and the British seemed to be favorable to the exclusion of any list of conditional contraband. Admiral Sperry also suggested:

That a paragraph be added to the list already approved, stipulating that no article is to be included in this list which is not intended exclusively for military use, and moreover that trade in any article whatever not legally included in the list shall never be prohibited as the result of a state of war. (Ibid, p. 1116.)

At the London Naval Conference, 1908–09, suggestions from the 10 leading maritime states varied in regard to conditional contraband. Some states favored the abolition of the category of conditional contraband as in the case of Spain and The Netherlands, and some made propositions of a general character covering articles which might be useful in peace and war. After much discussion in the Conference a list of conditional contraband was also drawn up and embodied in the following terms:

ARTICLE 24. The following articles and materials susceptible of use in war as well as for purposes of peace, are without notice, regarded as contraband of war, under the name of conditional contraband:

(1.) Food.

(2.) Forage and grain suitable for feeding animals.

(3.) Clothing and fabrics for clothing, boots and shoes, suitable for military use.

(4.) Gold and silver in coin or bullion; paper money.

(5.) Vehicles of all kinds available for use in war, and their unassembled parts.

(6.) Vessels, craft and boats of all kinds, floating docks, parts of docks, as also their unassembled parts.

(7.) Fixed railway material and rolling-stock, and material for telegraphs, radio telegraphs, and telephones.

(8) Balloons and flying machines and their unassembled distinctive parts as also their accessories, articles and materials distinctive as intended for use in connection with balloons or flying machines.

(9.) Fuel; lubricants.

(10.) Powder and explosives which are not specially adapted for use in war.

(11.) Barbed wire as also the implements for placing and cutting the same.

(12.) Horseshoes and horseshoeing materials.

(13.) Harness and saddlery material.

(14.) Binocular glasses, telescopes, chronometers, and all kinds of nautical instruments. (1909 Naval War College, International Law Topics, p. 63.)

Provision was made for additions to the above list by means of notified declarations in articles 23 and 25 and for omissions in article 26. In articles 27 and 28 attempt was made to exempt articles which in general are not susceptible of use in war and also certain articles which were in a specified free list. Many of the articles specifically exempted in 1909 were within a few years of special use in war and before 1914 this list was seen to be unduly restrictive.

The Declaration of London of 1909 had been operative during the Turco-Italian War in 1911–12 as shown in the following dispatch of October 19, 1911.

By a royal decree of October 13 the following instructions were approved in conformity with the principles of the Declaration of Paris, April 16, 1856, which belligerent countries are bound to respect, with the rules of The Hague Conventions of October 18, 1907, and of the Declaration of London of February 26, 1909, which the Government of the King desires to be respected as well, so far as the provisions of the laws in force in the Kingdom allow, although they have not yet been ratified by Italy; and they will serve to regulate the conduct of naval commanders in the operations of capture and prize during the war. (1912 Naval War College, International Law Situations, p. 108.)

The provisions of the Declaration of London as regards absolute and conditional contraband, were before 1914 regarded as satisfactory in view of the articles permitting changes on notification. There was, however, understandable criticisms of the list of articles enumerated as not to be declared contraband of war.

There was little criticism of article 29 which provided:

Neither are the following to be regarded as contraband of war:

(1) Articles and materials serving exclusively for the care of the sick and wounded. They may, nevertheless, in case of urgent military necessity and subject to the payment of com-

pensation, be requisitioned, if their destination is that specified in Article 30.

(2) Articles and materials intended for the use of the vessel in which they are found, as well as those for the use of her crew and passengers during the voyage (1909 Naval War College, International Law Topics, p. 71.)

Many of the provisions of the Declaration of London were embodied in national rules before 1914 and while some of these remained in force during the World War, the provisions relating to contraband because of changes in the use of materials and methods of warfare suffered wide extensions.

Early World War changes in contraband lists.—The British Government had on August 5, 1914, made known that it would regard as contraband the articles named as absolute and conditional contraband in the Declaration of London with the transfer of aircraft from the conditional to the absolute list.

On August 6, 1914, the American Secretary of State addressed to the American Ambassadors in the belligerent states and the Minister to Belgium an inquiry as to whether the respective states were " willing to agree that the laws of naval warfare laid down by the Declaration of London, 1909, shall be applicable to naval warfare during the present European conflict, provided that the governments with whom " they were or might be at war also agree to such application. The Secretary also said, " You will further state that this Government believes that acceptance of these laws by the belligerents would prevent grave misunderstandings which may arise as to the relations between belligerent and neutral powers. It, therefore, earnestly hopes that this inquiry may receive favorable consideration." (1914 U.S. Foreign Relations, Supplement, p. 216.)

Germany, August 10, and Austria-Hungary, August 13, replied to the effect that they would observe the provisions of the Declaration of London conditioned upon " like observance on the part of the enemy."

As replies were delayed from other states, the Secretary of State sent another telegram, August 19, pressing for reply. The reply from the British Foreign Office dated August 22 but received in Washington August 26, 1914, stated that the British Government had "decided to adopt generally the rules of the declaration in question, subject to certain modifications and additions which they judge indispensable to the efficient conduct of their naval operations." These modifications changed the lists of contraband, duration of liability and presumption of destination as well as other provisions. Russia and France followed Great Britain. The Government of the United States examined the British propositions hoping they might be of such character that the Government could advise general acceptance, but could not reach such a conclusion. Nevertheless, in a note of September 26, 1914, the Acting Secretary of State wrote:

* * * The United States stands ready either to accept the declaration as a whole, provided all of the belligerents accept it, or, to accept it for the period of the war with modifications and additions acceptable, on the one hand, to the United States and the Netherlands, the two neutral signatories, and, on the other hand, to all of the belligerents.

This Government in seeking general acceptance of the declaration as a code of naval warfare for the present war had in mind the adoption of the declaration as a whole and not such part of it as might be acceptable to certain belligerents and not to other belligerents. It considered that the declaration was to be applied as a complete code of which no rule could be ignored or supplemented, and in so doing it followed Article 65 of the declaration, which stipulates: "The provisions of the present declaration must be treated as a whole and cannot be separated."

The only reasonable explanation for the inclusion in the declaration of this requirement is that the instrument is composed largely of compromises on the part of the governments represented at the conference. Although the declaration is introduced with a general statement that "the signatory powers are agreed" that the rules contained in the declaration "correspond in substance with the generally recognized principles of international law", the proceedings of the conference as well as the documents relating to it prove that an agreement on many of the articles

was reached through reciprocal concessions. Being conceived in compromise and concession the declaration was accepted by the Government of the United States at the conference in London in the earnest hope that it might finally compose the differences which existed as to neutral rights and neutral duties, although in so accepting this Government was compelled to abandon certain rules of conduct which it has heretofore always maintained.

As might be expected in a settlement of divergent views and practices by mutual concession the Declaration of London contains provisions both advantageous and disadvantageous to the respective interests of neutrals and belligerents. But it is now proposed by Great Britain to retain all the provisions favorable to belligerents and to recast other provisions so that they will be less favorable to neutral interests. The result is a set of rules which limits neutrals' rights far more than does the declaration itself treated as a whole. War, in any event, bears heavily upon a neutral nation. The interruption of its commerce and the limitations placed upon its trade are sufficiently burdensome under the rules of the Declaration of London. In consenting to those rules the Government of the United States made great concessions on its part and it does not feel that it can, in justice to its own people, go further. It cannot consent to the retention of a part of this compromise settlement and to the rejection of another part. The adoption of the declaration so modified is contrary to the customary procedure incident to compromise settlements, to the express provisions of the declaration itself, and to the spirit which induced its signature. (Ibid, p. 227.)

This note further stated that the British modifications struck at accepted neutral rights, created misunderstandings, revised practices supposed to be abandoned even by Great Britain and, if admitted, might place the United States in an equivocal position which might imperil the friendly relations with Great Britain.

In a memorandum of a conference of Acting Secretary Lansing with the British Ambassador on September 29, 1914, it is said,

A discussion of the provisions of the order in council followed in which the Ambassador said that he agreed that the order in council practically made foodstuffs absolute contraband, which was contrary to the British traditional policy as well as to that of the United States. He said that the immediate cause had

been the introduction through Rotterdam in first days of the war of large quantities of food supplies for the German army in Belgium, and that it seemed absolutely necessary to stop this traffic.

I replied that, while I appreciated that such reasons must weigh very heavily with those responsible for the successful conduct of the war, it seemed unfortunate that some other means could not have been found to accomplish the desired purpose, either by getting the Netherlands to place an embargo on foodstuffs and other conditional contraband or by agreeing not to reexport such articles. The Ambassador said that he agreed that would be much the better way, and that he believed it could be done.

He said that now the chief anxiety seemed to be in regard to shipments of copper and petroleum and also of Swedish iron, and that the British Government was stopping vessels with such cargoes and purchasing them. He suggested that possibly the difficulty created by the order in council could be removed by rescinding it and adding to the list of absolute contraband petroleum products, copper, barbed wire and other articles of like nature now used almost exclusively for war purposes.

I said that as to this suggestion I could not speak for the Government but that it seemed worthy of consideration as it might offer a means of getting rid of the order in council which certainly menaced the very friendly relations existing if it became the subject of discussion by the press. I told him that I did not think that the feeling which the order in council would arouse when generally understood, would be among the shippers as much as among the American public at large; and that, even if no case arose under it, the fact that the British Government had issued a decree, which menaced the commercial rights of the United States as a neutral, in violation of the generally accepted rules of international law, would undoubtedly cause irritation, if not indignation, and might change the sentiment of the American people, of which Great Britain had no reason to complain at the present time. (Ibid., p. 234.)

There was much interchange of opinion between the belligerents and neutrals in regard to contraband. The European neutral states being the smaller states were often obliged to yield to the terms proposed by the strong belligerents. Each belligerent brought forth the argument that its extreme action was based on self-defense which might justify the setting aside its obligations under international law.

The United States, a powerful neutral, in its early contentions maintained the attitude of a state about to insist upon its neutral rights. Great Britain in a communication of October 9, 1914, indicated that its list of contraband should, subject to certain additions and modifications, conform to the Declaration of London and that it was hoped this list would meet the approval of the United States. This proposed list did include under absolute contraband rubber and ores which under article 28 of the Declaration of London had unwisely been placed in the list of articles not to be declared contraband of war. Some equable adjustment between the Department of State of the United States and Great Britain on the basis of actual war conditions and needs seemed to be foreshadowed in early October 1914. On October 15, Mr. Walter Hines Page, Ambassador to Great Britain, said in a communication to the Secretary of State:

> I recommend most earnestly the substantial acceptance of the new order in council or our acquiescence with a reservation of whatever rights we may have; and I recommend prompt information to the British Government of such action. (1914 U.S. Foreign Relations, Supplement, p. 249.)

To follow this recommendation would involve abandoning many of the positions which the State Department had recently taken and on October 16 the Department of State sent to the American Ambassador in Great Britain a telegram embodying certain new plans.

> The desire of this Government is to obtain from the British Government the issuance of an order in council adopting the declaration without any amendment whatsoever and to obtain from France and Russia like decrees, which they will undoubtedly issue if Great Britain sets the example. Such an adoption by the allied Governments will put in force the acceptance of the Declaration of London by Germany and Austria, which will thus become for all the belligerent powers the code of naval warfare during the present conflict. This is the aim of the United States.
>
> It cannot be accomplished if the declaration is changed in any way as Germany and Austria would not give their consent to a change.

In the frequent informal and confidential conversations which have taken place here and in the admirable frankness with which Sir Edward Grey has stated the reasons for the action which Great Britain has deemed it necessary to take in regard to the declaration, this Government feels that it fully understands and appreciates the British position, and is not disposed to place obstacles in the way of the accomplishment of the purposes which the British representatives have so frankly stated.

The confidence thus reported in this Government makes it appreciate more than ever the staunch friendship of Great Britain for the United States, which it hopes always to deserve.

This Government would not feel warranted in offering any suggestion to the British Government as to a course which would meet the wishes of this Government and at the same time accomplish the ends which Great Britain seeks, but you might in the strictest confidence intimate to Sir Edward Grey the following plan, at the same time stating very explicitly that it is your personal suggestion and not one for which your Government is responsible.

Let the British Government issue an order in council accepting the Declaration of London without change or addition, and repealing all previous conflicting orders in council.

Let this order in council be followed by a proclamation adding articles to the lists of absolute and conditional contraband by virtue of the authority conferred by Articles 23 and 25 of the declaration.

Let the proclamation be followed by another order in council, of which the United States need not be previously advised, declaring that, when one of His Majesty's Principal Secretaries of State is convinced that a port or the territory of a neutral country is being used as a base for the transit of supplies for an enemy government a proclamation shall issue declaring that such port or territory has acquired enemy character in so far as trade in contraband is concerned and that vessels trading therewith shall be thereafter subject to the rules of the declaration governing trade to enemy's territory.

It is true that the latter order in council would be based on a new principle. The excuse would be that the Declaration of London failing to provide for such an exceptional condition as exists, a belligerent has a right to give a reasonable interpretation to the rules of the declaration so that they will not leave him helpless to prevent an enemy from obtaining supplies for his military forces although the belligerent may possess the power and would have the right to do so if the port or territory was occupied by the enemy.

When the last-mentioned order in council is issued, I am convinced that a full explanation of its nature and necessity would meet with liberal consideration by this Government and not be the subject of serious objection.

I repeat that any suggestion, which you may make to Sir Edward Grey, must be done in an entirely personal way and with the distinct understanding that this Government is in no way responsible for what you may say. (Ibid, p. 249.)

In his telegram from London of October 15, 1914, relating to differences in regard to the Declaration of London and shipping questions, the American Ambassador, Mr. Page, had said:

The question seems wholly different here from what it probably seems in Washington. There it is a more or less academic discussion. Here it is a matter of life and death for English-speaking civilization. It is not a happy time to raise controversies that can be avoided or postponed. Nothing can be gained and every chance for useful cooperation for peace can easily be thrown away and is now in jeopardy. In jeopardy also are our friendly relations with Great Britain in the sorest time of need in her history. I know that this is the correct, larger view. (Ibid, p. 248.)

The United States as a neutral state had proposed the maintenance of neutral rights and the President himself replied on October 16.

Beg that you will not regard the position of this Government as merely academic. Contact with opinion on this side the water would materially alter your view. Lansing has pointed out to you in personal confidential despatch of this date how completely all the British Government seeks can be accomplished without the least friction with this Government and without touching opinion on this side the water on an exceedingly tender spot. I must urge you to realize this aspect of the matter and to use your utmost persuasive efforts to effect an understanding, which we earnestly desire, by the method we have gone out of our way to suggest, which will put the whole case in unimpeachable form.

This is private and for your guidance.

WOODROW WILSON.

(Ibid, p. 252.)

Disappearance of contraband distinctions.—In a proclamation revising the British contraband list, October

29, 1914, there were two schedules, one to be treated as absolute contraband and the other as conditional contraband.

Vigorous protests had arisen against the German War Zone proclamation of February 4, 1915, which declared the waters surrounding Great Britain and Ireland

to be comprised within the seat of war and that all enemy merchant vessels found in those waters after the eighteenth instant will be destroyed although it may not always be possible to save crews and passengers.

Neutral vessels expose themselves to danger within this zone of war since in view of the misuse of the neutral flag ordered by the British Government on January thirty-first and of the contingencies of maritime warfare it cannot always be avoided that neutral vessels suffer from attacks intended to strike enemy ships. (1915 U.S. Foreign Relations, Supplement, p. 94.)

The attitude of Great Britain in regard to American communications on contraband and maritime warfare in general as viewed by the American Ambassador in Great Britain may be seen in the following telegram of May 21, 1915, to the Secretary of State:

Unofficial critics praise the courtesy and admit the propriety of our communications, but they regard them as remote and impracticable. They point out that we have not carried our points: namely, that copper should not be contraband, that ships should be searched at sea, that to-order cargoes should be valid, that our export trade had fallen off because of the war. They point out these in good-natured criticism as evidence of the American love of protest for political effect at home. While the official reception of our communications is dignified, the unofficial and general attitude to them is a smile at our love of letter writing as at Fourth of July orations. They quietly laugh at our effort to regulate sea warfare under new conditions by what they regard as lawyers' disquisitions out of textbooks. They [receive] them with courtesy, pay no further attention to them, proceed to settle our shipping disputes with an effort at generosity and quadruple their orders from us of war materials. They care nothing for our definitions or general protests but are willing to do us every practical favor and will under no conditions either take our advice or offend us. They regard our writings as addressed either to complaining shippers or to politicians at home.

For these reasons complaints about concrete cases as they arise are more effective than general communications about rules of sea warfare, which must be revised by the submarine, the aeroplane, the mine and our own precedents. (Ibid, p. 147.)

Further restrictions were put by the Allied Powers upon goods coming from or bound to Germany, and the American Secretary of State on March 30 said that the action constituted:

a practical assertion of unlimited belligerent rights over neutral commerce within the whole European area, and an almost unqualified denial of the sovereign rights of the nations now at peace.

This Government takes it for granted that there can be no question what those rights are. A nation's sovereignty over its own ships and citizens under its own flag on the high seas in time of peace is, of course, unlimited; and that sovereignty suffers no diminution in time of war, except in so far as the practice and consent of civilized nations has limited it by the recognition of certain now clearly determined rights, which it is conceded may be exercised by nations which are at war. (Ibid., p. 152.)

In a long note of February 12, 1915, from the British Foreign Secretary to the American Ambassador, it was said:

The most difficult questions in connection with conditional contraband arise with reference to the shipment of foodstuffs. No country has maintained more stoutly than Great Britain in modern times the principle that a belligerent should abstain from interference with the foodstuffs intended for the civil population. The circumstances of the present struggle are causing His Majesty's Government some anxiety as to whether the existing rules with regard to conditional contraband, framed as they were with the object of protecting so far as possible the supplies which were intended for the civil population are effective for the purpose, or suitable to the conditions present. The principle which I have indicated above is one which His Majesty's Government have constantly had to uphold against the opposition of continental powers. In the absence of some certainty that the rule would be respected by both parties to this conflict, we feel great doubt whether it should be regarded as an established principle of international law. * * *

The reason for drawing a distinction between foodstuffs intended for the civil population and those for the armed forces or enemy Government disappears when the distinction between the civil population and the armed forces itself disappears.

In any country in which there exists such tremendous organization for war as now obtains in Germany there is no clear diversion [*division*] between those whom the Government is responsible for feeding and those whom it is not. Experience shows that the power to requisition will be used to the fullest extent in order to make sure that the wants of the military are supplied, and however much goods may be imported for civil use it is by the military that they will be consumed if military exigencies require it, especially now that the German Government have taken control of all the foodstuffs in the country. (Ibid., p. 332.)

The Department of State of the United States on October 28, 1915, made certain inquiries in regard to the control of German resources and imports by the Government itself.

In Department's consideration of destination of conditional contraband, it is necessary to ascertain to what extent the military authorities have superseded civil authorities in the Government of Germany so far as control over imports are concerned, and to what extent the Government controls the use of articles on contraband list of Great Britain and her allies. Are private consignees free to import such articles without interference by authorities? (Ibid., p. 603.)

In reply to the above query, the following was received from Berlin on December 4, 1915:

Following information communicated verbally by Foreign Office; written answer promised:

(1) Owing to proclamation issued at outbreak of war, military authorities theoretically have power to supersede civil authorities, but, practically, power has been exercised in only few instances and not at all in connection with customs authorities.

(2) In so far as control of use of imported goods is concerned, Government regards enemy's list of conditional contraband as of no importance.

(3) Receipt and distribution of certain imported food and fodder products may take place only through central organization which distributes to civil parties only, but military authorities have power to requisition against payment anything needed by army or navy.

Chancellor has power to grant exemption from control and distribution and military authorities have power to guarantee in advance freedom from requisition of designated imported consignments in whole or part. (Ibid, p. 622.)

The protests of neutrals were answered after varying periods of delay but at length the Secretary of State of the United States after much correspondence said in a communication to the Ambassador in Great Britain, November 11, 1916,

SIR: With reference to the announcement made by the British Foreign Office, under date of April 13, 1916, of the intention of the British Government to treat alike absolute and conditional contraband, you are instructed to communicate to the Foreign Office a formal reservation, in regard to this announcement, in the sense that, in view of the established practice of a number of maritime nations, including Great Britain and the United States, of distinguishing between absolute and conditional contraband, the Government of the United States is impelled to notify the British Government of the reservation of all rights of the United States or its citizens in respect of any American interests which may be adversely affected by the abolition of the distinction between these two classes of contraband, or by the illegal extension of the contraband lists during the present war by Great Britain and her allies. (1916 U.S. Foreign Relations, Supplement, p. 483.)

The "Kim" and three other ships, 1915.—In October and November 1914 the *Kim*, the *Alfred Nobel*, the *Bjornsterjne Bjornson*, and the *Fridland*, all Norwegian ships except the *Fridland*, which was Swedish, sailed from New York for Copenhagen. In their cargoes were foodstuffs, rubber, and hides. The treatment of the cargoes and of the ships were made separate cases, and the reprisals order of March 11, 1915, was not made applicable.

In these cases inference as to ultimate destination to Germany of goods consigned to Copenhagen was based in the first instance upon the rapid increase in the relative amount of such goods shipped to Copenhagen in corresponding months of 1913 and 1914. There was also

an argument on the ground of evident deception and misinformation. The opinion states that

> Two important doctrines familiar to international law come prominently forward for consideration; the one is embodied in the rule as to "continuous voyage," or continuous "transportation;" the other relates to the ultimate hostile destination of conditional and absolute contraband, respectively. ([1915] P. 215; reprinted, 1922 Naval War College International Law Documents, p. 50.)

The lists of contraband both absolute and conditional have varied from time to time and according to circumstances. The belligerent has usually stood for an extended list while the neutral has desired a restricted list. Destination has always been a deciding factor in determining contraband. This has been particularly important in the application of the doctrine of continuous voyage. It has been maintained that the ultimate destination is to the country in which the goods are actually to become "a part of the common stock."

Many of the questions relating to ultimate destination were raised in the American Civil War. The party to whom the goods may be consigned does not always prove the ultimate destination. Goods often in time of peace are "to order or assigns." Even the British Government in the American Civil War did not deny that such consignments on British vessels might not be open to suspicion "which might be dispelled by the shippers." Somewhat similar questions might arise in shipments of goods to branches or agents or when no consignee is named.

In the case of the *Kim*, however, it was stated that:

> It is, no doubt, incumbent upon the captors in the first instance to prove facts from which a reasonable inference of hostile destination can be drawn, subject to rebuttal by the claimants. (Ibid.)

Destination.—If a distinction is made between absolute and conditional contraband, the distinction between enemy country and enemy forces becomes important. If an unfortified area becomes fortified, its status changes as a place to which goods may without liability be

shipped. If the population of an area which has been subject only to the civil law is mobilized and put under military control the status of the population changes as a population to which goods may without liability be shipped. If the business of a consignee of a cargo should suddenly change, as from a lawyer with no trade relations and on a small salary to a merchant ship owner to whom large and valuable cargoes were consigned, the burden of proof of the genuineness of the consignment might be upon him. (The *Hilleröd*, 1918, App. Cas. 412.)

Direct interference with neutral trade.—The accepted laws of war give to belligerents the right to interfere with neutral trade in two respects, contraband and blockade. Extension of these rights may involve continuous voyage or ultimate destination and there are certain analogies to unneutral service. During the World War as difficulties in maintaining blockades in north Europe increased, more reliance was placed upon the liberal or extreme interpretation of the laws in regard to contraband without, in the early stages of the war, resort to what were later called reprisals. There were also many changes in trade relations due to introduction of new means of transportation and communication between merchants in different states which made the application of some of the decisions of the nineteenth century doubtful. The tonnage of modern merchant vessels may make the problem of search much more difficult than in the early nineteenth century when the captured vessels were ordinarily under 250 tons. How far a merchant vessel of a neutral of 25,000 or 50,000 tons with its passengers may be delayed or diverted for visit or search or what may justify such delay or diversion are still debatable questions. The changes in the nature of materials used in war have made it more difficult to list articles which may be liable to capture. Chemical processes have in recent years greatly enlarged the list of materials useful for or essential in war. Other processes and uses may

render some materials obsolete and introduce new categories.

Exempt articles.—While hospital supplies usually received a measure of consideration in transit from neutral to belligerent countries, other articles were from time to time allowed to be exported. Some neutral states, owing to weakness, protested and submitted to restrictions generally admitted to be beyond the limits of legality. Some neutral states, for reasons less evident, submitted to unjustifiable interference with commerce.

Articles other than hospital supplies which supposedly could be of no service in war were sometimes mentioned as in the communication of the Consul General at London to the Secretary of State, December 23, 1916:

> Proclamation issued to-day requires that all articles exported to Holland be consigned to Dutch Government, diplomatic or consular officers, with permission of Ministry of Foreign Affairs, or Netherlands Oversea Trust, except printed matter, returned containers, worn clothing and personal effects, live animals not used for food, sanitary earthenware, pottery and common earthenware, books, dolls, toys, wooden clock cases, slate and slate pencils, postage stamp and postcard albums. Proclamation apparently intended to permit free shipment of articles here mentioned.
>
> SKINNER.

(1916 U.S. Foreign Relations Supplement, p. 490.)

Hospital supplies.—The American Ambassador in Spain sent on September 22, 1914, to the Secretary of State the following telegram:

> In an interview yesterday morning His Majesty informed me confidentially condition of wounded soldiers, particularly in French hospitals where there are inadequate supplies, especially of bandages and absorbent cotton, was deplorable and expressed an earnest wish for our cooperation in relieving this situation. To that end he hopes that the United States and Spanish Ambassadors accredited near various European courts now at war will make a joint request for arrangements between countries of hospital supplies and the such supplies in transit on the high seas may be considered by them neither contraband nor conditional contraband of war but free. Please telegraph whether Department can see its way clear to give to our diplomatic officers concerned the

instructions necessary to realize His Majesty's hope. (1914 U.S. Foreign Relations, Supplement, p. 831.)

The American Government immediately communicated this request to diplomatic representatives of the United States in the belligerent countries. It was naturally suggested that the detailed list of articles should be determined, but agreement in principle was general. The Russian reply favored a broad interpretation. The German reply follows:

Your circular September 24. The Foreign Office replies to joint request that No. 28, paragraph 1, of the German prize ordinance of September 30, 1909, already provides that articles serving exclusively to aid the sick and wounded shall not be treated as contraband and may be requisitioned subject to payment compensation only in case of urgent military necessity and when their destination is to the territory of the enemy or to territory occupied by the enemy or to the armed forces of the enemy. (Ibid, p. 835.)

The French Government said:

While appreciating the humanitarian attitude of the United States Government, the French Government does not think the moment propitious for agreement between belligerents, even on a subject which by its character should be placed beyond reach of conflict. Experience of contempt which certain belligerents show for international conventions to which they have agreed gives grounds for apprehension that they would not observe a new agreement nor execute its provisions as soon as it was to their advantage not to do so. The French Government recalls that definition of objects mentioned in Article 29 of the Declaration of London was summarily made in the general report at the London conference by the drafting committee, and it was thus agreed that the immunity established under Article 29 applied to drugs and various medicines. The French Government adds that while it might be a delicate matter to be more precise and extend obligations of belligerents during war beyond where they were fixed in time of peace, nevertheless it would not refuse to study the suggestions of the American Government to draw up a list of drugs and medicines whose character as "articles serving exclusively to aid the sick and wounded" shall be closely defined. (Ibid, p. 836.)

Later much discussion was carried on and Great Britain withdrew the list of articles to which the British Government had given exemption.

The attitude of the British Government was considered in a letter of ex-President Taft, then chairman of the central committee of the American Red Cross to the Secretary of State on May 8, 1916. In this letter Mr. Taft said,

> Since the beginning of the present war, the American Red Cross has invited contributions of money and supplies with which to aid the wounded and suffering of all the belligerents. We have shipped to the Red Cross societies of each belligerent hospital supplies contributed to us for that purpose. We have found no difficulty in sending such article to the Entente Allies. We have had to obtain permits from Great Britain for the shipments to the Red Cross of the Central powers. Until September 1915, there was substantially no delay in the granting of these permits by Great Britain. Since that time, we have had much difficulty in securing them, and the supplies donated in kind and designated for the use of the Central powers have accumulated in our warehouses in New York. A permit was granted for only one shipment since that time—in January of this year. Through your Department, we are now in receipt of a communication from the British Government, announcing that it does not intend to permit any further shipments, unless it is a shipment to our own hospital units, in a territory of the Central powers. This exception amounts to no concession, for the reason that as the British Government was advised in August last, after the first of October, for lack of funds, we were able to maintain no hospital units in any of the belligerent countries. The authorities of the American Red Cross believe that under the Geneva convention, to which the United States and all the belligerent powers are signatories, the United States has the treaty right to insist that articles serving exclusively to aid the sick and wounded in the form of hospital supplies, shipped by the American Red Cross to the Red Cross of the Central powers, shall not be declared contraband, but shall be allowed safe-conduct to their destination. (1916 U.S. Foreign Relations, Supplement, p. 948.)

Contraband distinctions.—As was shown in the World War, it is difficult and at times impossible to distinguish between absolute and conditional contraband. By na-

ture, some goods may equally serve the combatant and noncombatant population. If a consignment of goods is unquestionably for the civil population in a given area, these goods may in fact make it possible to send to the forces other goods which would have been essential in that area without the consignment and it has been held that it thus makes little difference which goods go to the forces as the result is the same. The means of transportation and methods of warfare have so far changed that nearly all parts of a state may serve its forces and nearly all goods may be of use for the forces. Indeed in the World War German courts seemed to regard all ports of England as ports which could be considered bases and the British seemed to regard practically all goods as of military use.

The distinctions between absolute and conditional contraband came to have little significance and to be little applied in practice. During the World War most states participating in the conflict formally abolished or tacitly disregarded the distinction.

Situation I (*a*) involves two matters: (1) the abolition of the distinction between conditional and absolute contraband; (2) the treatment of all goods bound for an enemy country as contraband.

Contraband consists of articles which a neutral may not furnish to one belligerent without risk of capture by the other belligerent. The essential items for consideration would be the nature of the article and the destination.

Goods of the nature of contraband of which capture might be justified would be such as would aid the belligerent in the conduct of the war. In early days when the conduct of the war depended almost wholly upon supplying the enrolled armed forces with the simple implements of war, lists were comparatively easy to draw up and did not vary greatly from year to year. Pitch-balls and javelins might be included in a contraband list, as in the treaties with Sweden, 1783, and some other early

treaties of the United States, but cotton and oil and many other articles were definitely excluded from the list, and it was provided they "shall not by any pretended interpretation be comprehended among prohibited or contraband goods" unless bound to places "besieged, blocked, or invested" so as to be "nearly surrounded by one of the belligerent powers."

The intention of such agreements was to confine the list of contraband to such articles as were actually for war use. Manifestly therefore for all contraband articles the destination was a matter of equal importance with the nature of the article itself, for if the article whatever its nature,. was not destined for war use it would not be liable as contraband. Speaking of articles of ordinary use such as provisions, Mr. Justice Story in the case of the *Commercen*, 1816, said, "if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband." (1 Wheat. 387.)

The attitude of leading states has varied in regard to what articles and when articles might be treated as conditional contraband. Even during the World War there were many conflicting opinions.

If a state mobilizes its whole population and all its resources for war, evidently it will be difficult if not impossible to distinguish among consignments destined for that state, and anything bound for the state, unless exempted on humanitarian grounds, may be liable to capture as contraband. The grounds of humanity would exempt articles whose sole use would be for medicinal and surgical purposes and articles necessary for Red Cross operations.

The changing use and impossibility of determining what may be of use in war from day to day and the possibility of mobilization of population would therefore justify the declaration that the distinction between absolute and conditional contraband is abolished.

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All goods other than those solely for humanitarian and Red Cross use might be declared contraband.

Early blockades.[2]—Some of the recent contentions in regard to blockades are similar to those made as early as the seventeenth century. The idea of a place besieged on land was coming to be applied to a port and for a time it was held that it should be closed by the enemy on all sides, landward as well as seaward. In the seventeenth century, however, some of the pronouncements speak of the ancient practice of forbidding transport of goods to certain areas under penalty and there seem to have been such proclamations as early as the thirteenth century. Of course, there was great variety of practice in these early days. The Dutch notification of June 26, 1630, declared in accord with ancient usage that vessels bound for enemy ports of Flanders, sailing from or entering, would with their cargoes be liable to confiscation. There were even in early days controversies in regard to what degree of force was essential to render such proclamations effective from a legal standpoint. Treaties of the seventeenth and eighteenth centuries refer to ports "besieged, blocked, or invested" and some prescribe how many ships shall be before a port in order that the blockade may be legal or how strong a battery must be on shore. The need of specification of limits to which the blockade would extend came later. Under article XIII of the treaty between the United States and Sweden and Norway, 1816, merchant vessels of either, when one was at war and the other was neutral, were entitled to notification of blockade at the line unless it could be proved that the neutral vessel knew or should have known of the blockade.

Declaration of Paris, 1856.—The Declaration of Paris of 1856 was accepted as stating the approved attitude upon blockade in the middle of the nineteenth century. This declaration upon blockade was "blockade in order

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[2] For treatment of special aspects of blockade, see Naval War College publications, 1901–32.

to be binding must be effective—that is to say maintained by a force sufficient really to prevent access to the coast of the enemy." This declaration has been repeatedly reaffirmed even during the World War. Manifestly the actual words may not be taken too literally for if they were strictly construed, blockade would cease to be binding when a single inward breech should occur, though egress from the coast would not be considered in the interpretation. What it was really aimed to prevent was resort to paper blockades by requiring a reasonably adequate blockading force before the coast which was declared blockaded.

As was said in the Supreme Court of the United States in 1899 in the case of the *Olinde Rodrigues:*

> But it can not be that a vessel actually captured in attempting to enter a blockaded port, after warning entered on her log by a cruiser off that port only a few days before, could dispute the efficiency of the force to which she was subjected.
>
> As we hold that an effective blockade is a blockade so effective as to make it dangerous in fact for vessels to attempt to enter the blockaded port, it follows that the question of effectiveness is not controlled by the number of the blockading force. In other words, the position can not be maintained that one modern cruiser though sufficient in fact is not sufficient as matter of law. (174 U.S. 510.)

Declaration of London and blockade.—The provisions of the unratified Declaration of London, 1909, were agreed upon by representatives of the naval powers after full discussion. Article 1 of the Declaration of London stated,

> A blockade must be limited to the ports and coasts belonging to or occupied by the enemy.

The purpose of this article was, viewing blockade as a war measure, to direct its consequences only against the enemy. The Declaration of London regarded the statement in the Declaration of Paris as the first necessary condition and as a matter upon which "for a long time there has been universal agreement." Detailed

rules were prescribed for the establishing and raising of blockade.

Article 18 of the Declaration of London states that,

> The blockading forces must not bar access to the ports or to the coasts of neutrals.

In the general report presented to the naval conference on behalf of the drafting committee, it was said of article 18,

> This rule has been thought necessary for the better safeguarding of the commercial interests of neutral countries; it completes Article 1, according to which a blockade must be limited to the ports and coasts of the enemy, which implies that, since it is an operation of war, it should not be directed against a neutral port, in spite of the interest that a belligerent may have in it because of the part played by that neutral port in supplying his adversary. (1909 Naval War College, International Law Topics, p. 53.)

During the wars between 1909 and 1914 the provisions of the Declaration of London in regard to blockade were followed.

During the early days of the World War there were some slight changes in the provisions in regard to presumption of knowledge of blockade. In the areas outside of Western Europe the blockade was declared with the understood respect for ordinary rules.

American views.—Early in the World War controversies arose in regard to the use of ships in the neighborhood of the North Sea. Great Britain and Germany particularly argued with neutrals in regard to violation of neutral rights. The Government of the United States proposed adherence to the Declaration of London, but this was not adopted. The Government of the United States also protested against the extension of interference with American trade and British Orders in Council were mentioned in communications from the Department of State as early as September 29, 1914, as menacing "the commercial rights of the United States as a neutral, in violation of the generally accepted rules of interna-

tional law." (1914 U.S. Foreign Relations, Supplement 234.) Later in referring to British and French declarations as to retaliation upon neutral commerce with Germany, the Secretary of State of the United States said on March 5, 1915,

> While it appears that the intention is to interfere with and take into custody all ships both outgoing and incoming trading with Germany, which is in effect a blockade of German ports, the rule of blockade, that a ship attempting to enter or leave a German port regardless of character of its cargo may be condemned, is not asserted.
>
> The language of the declaration is: "the British and French Governments will, therefore, hold themselves free to detain and take into port ships carrying goods of presumed enemy destination, ownership, or origin. It is not intended to confiscate such vessels or cargoes unless they would otherwise be liable to condemnation."
>
> The first sentence claims a right pertaining only to a state of blockade. The last sentence proposes a treatment of ships and cargoes as if no blockade existed. The two together present a proposed course of action previously unknown to international law.
>
> As a consequence neutrals have no standard by which to measure their rights or to avoid danger to their ships and cargoes. The paradoxical situation thus created should be changed and the declaring powers ought to assert whether they rely upon the rules governing a blockade or the rules applicable when no blockade exists. (Ibid., 1915, Supplement, 132.)

World War discussions.—On August 20, 1914, a British Order in Council announced that the British, French, and Russian naval forces would, as affects neutral ships and commerce, conduct the war on similar principles. So far as practicable they would act in accordance with the provisions of the Declaration of London. In addition to exchanges in the provisions in regard to contraband, these states made some modifications as to destination of cargo and presumption of knowledge of blockade. The Government of the United States had made an effort to have the Declaration of London accepted without amendment and the Central Powers had expressed a favorable attitude toward this action.

In a note of September 26, 1914, the United States said of the Declaration of London:

As might be expected in a settlement of divergent views and practices by mutual concession the Declaration of London contains provisions both advantageous and disadvantageous to the respective interests of neutrals and belligerents. But it is now proposed by Great Britain to retain all the provisions favorable to belligerents and to recast other provisions so that they will be less favorable to neutral interests. The result is a set of rules which limits neutrals' rights far more than does the declaration itself treated as a whole. War, in any event, bears heavily upon a neutral nation. The interruption of its commerce and the limitations placed upon its trade are sufficiently burdensome under the rules of the Declaration of London. In consenting to those rules the Government of the United States made great concessions on its part and it does not feel that it can, in justice to its own people, go further. It cannot consent to the retention of a part of this compromise settlement and to the rejection of another part. The adoption of the declaration so modified is contrary to the customary procedure incident to compromise settlements, to the express provisions of the declaration itself, and to the spirit which induced its signature. (1914 U.S. Foreign Relations, Supplement, p. 228.)

The British additions and modifications greatly enlarged the Declaration of London presumption as to destination and would, according to the American note, give to Great Britain "the advantages of an established blockade without the necessity of maintaining it with an adequate naval force. The effect of this asserted right suggests the result which was sought by the so-called 'paper blockades' which have been discredited for a century, and were repudiated by the Declaration of Paris." (Ibid, p. 229.)

In this strong note of September 26, 1914, the United States further says,

Finally this Government considers that the Declaration of London, as changed by the order in council, would result in such an interference with the customary rights of neutral commerce that the United States could not assent to it or submit to its enforcement, for the reason that to recognize it as a measure of the neutral rights of the United States would, in the opinion of this

Government, be a manifest failure on its part to safeguard the interests of American citizens engaged in legitimate traffic with the subjects of belligerent and neutral nations.

In view of these considerations this Government is obliged to inform the Government of His Britannic Majesty that the United States would be unable to accept the declaration as thus modified though all the belligerents should concur in the modifications suggested by Great Britain. The Government of the United States, therefore, reserves all the rights which it has under the law of nations in relation to any losses or damages which may occur by reason of captures or condemnations made by the Government of Great Britain under the provisions of the Declaration of London as modified by the order in council of August 20, 1914. (Ibid., p. 231.)

In the British note of August 22, 1914, referring to the Order in Council of August 20, there had been the statement,

The peculiar conditions in the present war due to the fact that neutral ports such as Rotterdam are the chief means of access to a large part of Germany and that exceptional measures have been taken in the enemy country for the control by the Government of the entire supply of foodstuffs have convinced His Majesty's Government that modifications are required in the applications of Articles 34 and 35 of the declaration. These modifications are contained in paragraphs 3 and 5 of the accompanying order-in-council. (Ibid., p. 219.)

Paragraphs 3 and 5 here mentioned are as follows:

(3) The destination referred to in Article 33 [use of the armed forces or of a government department] may be inferred from any sufficient evidence, and (in addition to [the] presumption laid down in Article 34) shall be presumed to exist if the goods are consigned to or for an agent of the enemy state or to or for a merchant or other person under the control of the authorities of the enemy state. * * *

(5) Notwithstanding the provisions of Article 35 [ship's papers conclusive proof of voyage and port of discharge except when off course] of the said declaration, conditional contraband, if shown to have the destination referred to in Article 33, is liable to capture, to whatever port the vessel is bound and at whatever port the cargo is to be discharged. (Ibid., p. 220.)

The Acting Secretary of State Lansing also said in the note of September 26, 1914, in regard to interference with

commerce to a neutral port, such as Rotterdam, mentioned in the British memorandum,

> Furthermore, if the modifications were acceptable to this Government, it would be unwilling, by accepting them, to prejudice the rights of the Netherlands, the other signatory of the declaration neutral in the present war, whose interests, as the memorandum of the Foreign Office discloses, will be vitally affected by the changes proposed. (Ibid., p. 231.)

The same matter received further consideration in an interview between the American Ambassador and the British Foreign Secretary.

> The British purpose he went on to say was to prevent the enemy from receiving food and materials for military use and nothing more. I explained that the people of the United States had a trade with Holland apart from supplies and materials meant for Germany and that our Government could not be expected to see that sacrificed or interfered with. (Ibid., p. 233.)

Further correspondence expressed the American desire that there should be the minimum interference with neutral commerce and that the accepted principles of international law should be observed. The British Government replied to the effect that,

> We [the British Government] had only two objects in our proclamations: To restrict supplies for German army and to restrict supply to Germany of materials essential for making of munitions of war. We wished to attain these objects with the minimum of interference with the United States and other neutral commerce. (Ibid., p. 237.)

After much more correspondence and proposals and counterproposals in regard to the Declaration of London, the Acting Secretary of State withdrew the suggestion that the Declaration of London be a temporary code of naval warfare and said,

> this Government will insist that the rights and duties of the United States and its citizens in the present war be defined by the existing rules of international law and the treaties of the United States irrespective of the provisions of the Declaration of London; and that this Government reserves to itself the right to enter a protest or demand in each case in which those rights

and duties so defined are violated or their free exercise interfered with by the authorities of His Britannic Majesty's Government. (Ibid, p. 258.)

The British Order in Council of March 11, 1915, clearly stated to be in reprisal against the German declaration of the war zone about the United Kingdom, was considered by some as in effect a blockade, but its provisions were quite unlike those establishing a blockade and involved consequences far in excess of blockade liabilities. The Order in Council of February 16, 1917, supplemental to earlier orders gives an idea of the extent to which under reprisal measures neutrals were expected to tolerate interference with their commerce:

1. A vessel which is encountered at sea on her way to or from a port in any neutral country affording means of access to the enemy territory without calling at a port in British or Allied territory shall, until the contrary is established, be deemed to be carrying goods with an enemy destination, or of enemy origin, and shall be brought in for examination and, if necessary, for adjudication before the Prize Court.

2. Any vessel carrying goods with an enemy destination, or of enemy origin, shall be liable to capture and condemnation in respect of the carriage of such goods; provided that, in the case of any vessel which calls at an appointed British or Allied port for the examination of her cargo, no sentence of condemnation shall be pronounced in respect only of the carriage of goods of enemy origin or destination, and no such presumption as is laid down in Article I shall arise.

3. Goods which are found on the examination of any vessel to be goods of enemy origin or of enemy destination shall be liable to condemnation.

4. Nothing in this Order shall be deemed to affect the liability of any vessel or goods to capture or condemnation independently of this Order. (Statutory Rules and Orders, 1917, p. 953.)

As is evident neutrals were also liable under accepted principles of international law.

None of the Orders in Council specifically used the word blockade though the aim was to prevent communication with the enemy.

In the British memorandum of February 20, 1915, it was said in justification of their action,

The Government of Great Britain have frankly declared, in concert with the Government of France, their intention to meet the German attempt to stop all supplies of every kind from leaving or entering British or French ports by themselves stopping supplies going to or from Germany for this end. The British fleet has instituted a blockade, effectively controlling by cruiser "cordon" all passage to and from Germany by sea. The difference between the two policies is, however, that while our object is the same as that of Germany, we propose to attain it without sacrificing neutral ships or non-combatant lives or inflicting upon neutrals the damage that must be entailed when a vessel and its cargo are sunk without notice, examination, or trial. I must emphasize again that this measure is a natural and necessary consequence of the unprecedented methods, repugnant to all law and morality, which have been described above, which Germany began to adopt at the very outset of the war, and the effects of which have been constantly accumulating. (1915 U.S. Foreign Relations, Supplement, p. 142.)

This act departed from the accepted principles of international law in regard to blockades and later correspondence does not attempt to justify the Orders in Council on such grounds.

Proclaimed blockades in World War.—Blockades were regularly proclaimed in numerous instances during the early years of the World War.

Austria-Hungary proclaimed in 1914 "that from August 10, at noon, the coast of Montenegro will be held in a state of effective blockade by the Austro-Hungarian naval forces." (1917 Naval War College, International Law Documents, p. 53.)

The Japanese blockade of leased territory of Kiao-Chau was somewhat more detailed as to hours of grace for departure of vessels, etc.

The successive notifications in regard to the coast of the Cameroons show the regularity of certain British procedure.

FOREIGN OFFICE, *April 24, 1915.*

His Majesty's Government have decided to declare a blockade of the coast of the Cameroons as from midnight April 23–24. The blockade will extend from the entrance of the Akwayafe

River to Bimbia Creek, and from the Benge mouth of the Sanaga River to Campo.

Forty-eight hours' grace from the time of the commencement of the blockade will be given for the departure of neutral vessels from the blockaded area.

With reference to the notification, dated April 24, 1915, which appeared in the London Gazette of April 27 last, His Majesty's Government give notice that the blockade of the coast of Cameroons has been raised so far as concerns the coast line from the Akwayafe River to Bimbia Creek. The blockade still remains in force from the Benge mouth of the Sanaga River to Campo.

Foreign Office, January 8, 1916.

With reference to the notification dated January 11, 1916, which appeared in the London Gazette of that date, His Majesty's Government give notice that the blockade of the coast of the Cameroons, which had been maintained in force from the Benge mouth of the Sanaga River to Campo, is completely raised as from midnight (Greenwich time), February 29–March 1. (Ibid., p. 135.)

The French notification of the blockade of Greece gives a detailed statement.

The Government of the French Republic, having agreed with its allies to declare a blockade of Greece, hereby gives notice of the conditions by which they will proceed.

The blockade is declared effective from December 8, 1916, at 8 o'clock in the morning.

The blockade extends to the coasts of Greece and comprises the islands of Eubee, Zarite, and Sainte-Maure from a point situated at 39°20′ north, 20°20′ east of Greenwich, to a point situated 39°50′ north, 22°50′ east of Greenwich, as well as the islands actually under the dependence or the occupation of the Royal Hellenic authorities.

Vessels of third powers finding themselves in blockaded ports can freely depart until December 10 at 8 o'clock in the morning.

The order has been given to the commander in chief of the blockading forces to proceed immediately to notify the local authorities of the present declaration.

Paris, December 7, 1916. (Ibid., p. 93.)

Export prohibitions and embargoes.—The extreme measures of the belligerents in regard to movement of goods in the World War led neutrals to prohibit the export of certain articles. Sometimes neutral prohibitions were resorted to in order to prevent undue depletion of

national stocks or resources and sometimes in order that foreign commerce might not be closed by belligerent restraints. Neutral states in close proximity to belligerent areas such as Denmark, Netherlands, Norway, Sweden, and Switzerland issued lists of articles of which export was prohibited. These lists varied in comprehensiveness. The lists of Greece and Spain were short. The list of Sweden was long. That of Switzerland enumerating more than 200 articles, e.g., "acetones" or categories, e.g., "telephone apparatus, as well as component parts thereof, notably microphones, field cables, insulating rubber, electric batteries; electric ignition plugs for automobiles" (1915 Naval War College, International Law Topics, p. 53), was about average in number of named articles or categories.

The belligerents placed restrictions or embargoes upon the export and transit of certain goods and blacklisted persons or firms so that the restraints on commerce became of serious consequence to many states. The British list was long and many firms were placed on the blacklist. The German list contained hundreds or articles arranged under careful classifications, as: I. Animals and animal products: (*a*) Living animals; (*b*) meat, meat products, fish (not live); (*c*) milk, butter, animal fats; (*d*) refuse, bristles, bones, etc. Under each of the above, detailed lists were given.

In spite of the self-imposed restrictions of neutral states, the belligerents continually added to the difficulties of carrying on neutral commerce.

Belligerent embargoes.—(*a*) British. There were several orders prohibiting certain exports from Great Britain during 1914 and 1915. These were issued under "The customs and inland revenue act, 1879", "The exportation of arms act, 1900", and "The customs exportation prohibition act, 1914." The proclamation of February 3, 1915, and the orders of March 2 and 18, of April 15, 21, and 26, of May 6 and 20, of June 2 and

24, and of July 8 and 19, were issued in pursuance of the above acts. In August 1914 it was deemed expedient to consolidate the proclamation and orders and a new proclamation to that end was made. The proclamation named goods in three categories: (*a*) exportation prohibited to all destinations, (*b*) exportation prohibited to other than British possessions and protectorates, and (*c*) exportation prohibited to all foreign countries in Europe and on the Mediterranean and Black Seas other than France, Russia (except Baltic ports), Italy, Spain, and Portugal.

(*b*) German. Under General Imperial Order of July 31, 1914, embargoes were placed on exportation, transit, and carriage of arms, ammunition, powder, etc. A long list of prohibited exports was published and to this articles were added by supplementary lists. This list became sufficiently comprehensive to include floating docks, truffles, and broccoli. No distinction was made as to destination in the German list.

It might be argued that the belligerents prohibited the export of the articles named in their lists because these articles were essential for war purposes or needed for the war in progress. If this was the case, the list issued by one belligerent might be regarded by the other belligerent as the basis for the enumeration of articles which it would proclaim contraband and it would be difficult of a neutral to maintain that these articles which the belligerent had itself declared thus essential might not be placed in the list of contraband.

Retaliation.—During the early days of the World War, action not sanctioned by international law but under Orders in Council was not held in British courts as conclusive against neutrals. In the decision in the case of the *Zamora* in 1916 it was said, however:

> A prize court must, of course, deal judicially with all questions which came before it for determination, and it would be impossible for it to act judicially if it were bound to take its orders from one of the parties to the proceedings.

In the second place, the law which the prize court was to administer was not the national, or, as it was sometimes called, the municipal law, but the law of nations—in other words, international law. It was worth while dwelling for a moment on that distinction. Of course, the prize court was a municipal court and its decrees and orders owed their validity to municipal law. The law which it enforced might, therefore, in one sense, be considered a branch of municipal law. Nevertheless, the distinction between municipal and international law was well defined. A court which administered municipal law was bound by and gave effect to the law as laid down by the sovereign State which called it into being. It need inquire only what that law was, but a court which administered international law must ascertain and give effect to a law which was not laid down by any particular State, but originated in the practice and usage long observed by civilized nations in their relations with each other or in express international agreement. * * *

The fact, however, that the prize courts in this country would be bound by acts of the imperial legislature afforded no ground for arguing that they were bound by the executive orders of the King in council. * * *

An order authorizing reprisals will be conclusive as to the facts which are recited as showing that a case for reprisals exists, and will have due weight as showing what, in the opinion of His Majesty's advisers, are the best or only means of meeting the emergency; but this will not preclude the right of any party aggrieved to contend, or the right of the court to hold, that these means are unlawful, as entailing on neutrals a degree of inconvenience unreasonable, considering all the circumstances of the case. (1916 A.C. 77; 1922 Naval War College, International Law Documents, p. 126.)

While the right of retaliation as against an enemy may depend upon the action of the enemy, the justification of retaliation toward an enemy does not create new rights for either belligerent as regard neutrals. The degree of retaliation as regards the offending belligerent will naturally depend upon the character of the act against which retaliatory measures are instituted. The contention sometimes advanced that one belligerent may proportion his retaliatory measures so as to remedy evils to which neutrals may have been or may later be subjected presumes that this belligerent is defending or

maintaining neutral rights which is not within the sphere of lawful belligerent action and even might give grounds for the other belligerent to claim a nonneutral relation between its opponent and the protected neutral. There may be a wide divergence of interpretation between neutrals and belligerents as to their respective rights. It is entirely within the competence of a neutral to determine what action it may take to maintain its rights and not for one of the belligerents to take upon itself the definition and defense of assumed neutral rights under a plea of retaliation.

The neutral is, of course, liable to such inconvenience and restraint as may be incidental to the exercise of proper retaliatory action aimed directly at one belligerent by the other, but retaliatory measures should not be aimed directly or indirectly at neutrals.

To argue that one belligerent may be justified in interfering with neutral rights under retaliatory measures to secure the common good is to prejudge the merits of the contest or to affirm as usually is the case of each belligerent that its cause is the just cause.

Retaliation measures, 1914.—The German proclamation of February 4, 1915, declared that after February 18 the waters surrounding Great Britain and Ireland and the waters of the English Channel would be a war zone within which all enemy merchant vessels would be destroyed and within which neutral vessels expose themselves to danger. The American Secretary of State viewed the act of Germany with "grave concern" and said on February 10,

> It is of course not necessary to remind the German Government that the sole right of a belligerent in dealing with neutral vessels on the high seas is limited to visit and search, unless a blockade is proclaimed and effectively maintained, which this Government does not understand to be proposed in this case. To declare or exercise a right to attack and destroy any vessel entering a prescribed area of the high seas without first certainly

determining its belligerent nationality and the contraband character of its cargo would be an act so unprecedented in naval warfare that this Government is reluctant to believe that the Imperial Government of Germany in this case contemplates it as possible. (1915 U.S. Foreign Relations, Supplement, p. 98.)

The German Embassy in Washington had on February 7 transmitted to the Secretary of State a "Memorandum of the German Government concerning retaliation against Great Britain's illegal interference with trade between neutrals and Germany" in which mention was made of the British disregard of the Declaration of Paris and of the Declaration of London.

This introduction of the idea of retaliation into the relations between the belligerents would threaten the rights of neutrals. If the neutrals were weak, vacillating, or hesitating in maintaining their rights, the retaliatory acts of belligerents would more and more impinge upon neutral rights. The belligerents might even argue that as neutral rights had been generally admitted as equable as regards belligerents and neutrals on the supposition that they would be maintained, any failure to maintain these rights as against one belligerent would be an act in favor of that belligerent. Indeed during the World War each belligerent protested the failure of the United States to insist upon its neutral rights which according to the protests had been disregarded by the other belligerent.

Germany in supporting the establishing of the war zone about Great Britain and Ireland and in the English Channel, in a note of February 16, 1915, said,

Germany is to all intents and purposes cut off from oversea supplies with the toleration, tacit or protesting, of the neutrals regardless of whether it is a question of goods which are absolute contraband or only conditional contraband or not contraband at all, following the law generally recognized before the outbreak of the war. On the other hand England with the indulgence of neutral governments is not only being provided with such goods as are not contraband or merely conditional contraband, namely, food-

stuffs, raw material, *et cetera*, although these are treated by England when Germany is in question as absolute contraband, but also with goods which have been regularly and unquestionably acknowledged to be absolute contraband. The German Government believe that they are obliged to point out very particularly and with the greatest emphasis, that a trade in arms exists between American manufacturers and Germany's enemies which is estimated at many hundred million marks.

The German Government have given due recognition to the fact that as a matter of form the exercise of rights and the toleration of wrong on the part of neutrals is limited by their pleasure alone and involves no formal breach of neutrality. The German Government have not in consequence made any charge of formal breach of neutrality. The German Government can not, however, do otherwise, especially in the interest of absolute clearness in the relations between the two countries, than to emphasize that they, in common with the public opinion in Germany, feel themselves placed at a great disadvantage through the fact that the neutral powers have hitherto achieved no success or only an unmeaning success in their assertion of the right to trade with Germany, acknowledged to be legitimate by international law, whereas they make unlimited use of their right to tolerate trade in contraband with England and our other enemies. Conceded that it is the formal right of neutrals not to protect their legitimate trade with Germany and even to allow themselves knowingly and willingly to be induced by England to restrict such trade, it is on the other hand not less their good right, although unfortunately not exercised, to stop trade in contraband, especially the trade in arms, with Germany's enemies. * * *

The German Government repeat that in the scrupulous consideration for neutrals hitherto practised by them they have determined upon the measures planned only under the strongest compulsion of national self-preservation. Should the American Government at the eleventh hour succeed in removing, by virtue of the weight which they have the right and ability to throw into the scales of the fate of peoples, the reasons which have made it the imperative duty of the German Government to take the action indicated, should the American Government in particular find a way to bring about the observation of the Declaration of London on the part of the powers at war with Germany and thereby to render possible for Germany the legitimate supply of foodstuffs and industrial raw materials, the German Government would recognize this as a service which could not be too

highly estimated in favor of more humane conduct of war and would gladly draw the necessary conclusions from the new situation thus created. (Ibid. p. 113.)

Pages of somewhat similar correspondence brought replies and counter replies from various neutrals and belligerents, but little in the way of observance of the accepted laws of maritime warfare.

The armed neutralities of 1780 and 1800 as well as the neutrality of the United States in the last decade of the eighteenth century and others showed that some means other than note writing might be essential to preservation of neutral rights. Switzerland took such means for safeguarding its territorial and aerial jurisdiction from invasion. The Netherlands extended protection also to its maritime jurisdiction. The Hague Conventions, as article 10, Convention V, 1907, recognize the possibility that neutrals may be called upon to maintain their rights, and this article states,

> The fact of a neutral Power repelling even by force, attempts to violate its neutrality cannot be regarded as a hostile act.

Summary.—Modern conditions, as shown in the many and lengthy communications during the World War, have changed the ideas as to the actual conduct of war.

As to contraband, it has become increasingly difficult to employ intelligently such categories as contraband by nature because some article which by nature is specially essential to the life of a population at peace may be even absolutely essential to the state forces in time of war. A new invention or discovery during war may transform a category of articles, which at the beginning of the war were solely of use for the peaceful population, into essential war material. The list of such articles should ordinarily be determined by the belligerent and each belligerent would normally expect that the other might include in his contraband list any article included in the list of the opponent. There is also evi-

dent in modern times the influence of the unfavorable attitude which one or more neutral states may take toward a contraband list which does not bear the marks of military need justifying interference with neutral goods.

There is one category of goods the exemption from capture of which is generally recognized. That is, articles serving exclusively for the care of the sick and wounded. It is for the mutual advantage of both belligerents that such supplies be abundant.

As to blockade, it may be sufficient to repeat what was said in article 18, and the comment upon that article, of the Declaration of London:

> The blockading forces must not bar access to the ports or to the coasts of neutrals. (1909 Naval War College, International Law Topics, p. 53.)

World War practice and the general opinion of writers does not afford sanction to the claim of a right of vessels to pass through a neutral river to a belligerent port. The fluvial and maritime navigation of a neutral state is within the jurisdiction of that state and not subject to regulation by a belligerent. Outside of neutral jurisdiction the belligerent may act in accord with the laws of war. Belligerent forces may, of course, seize outside of neutral jurisdiction vessels having a belligerent destination or having on board goods bound for a belligerent. Such vessels in Situation I (*b*) would not, when brought before a prize court, be liable for penalties under the laws of blockade.

SOLUTION

(*a*) State X may declare all distinction between absolute and conditional contraband abolished, but this does not make all goods contraband nor does it give to state X a right to treat all articles bound for Y as contraband.

(*b*) State Y may not lawfully maintain a blockade of the ports of state X to which there is access only through a navigable river of neutral state D, nor may state Y prevent vessels from entering the river Dana, though it may seize vessels outside neutral jurisdiction when transporting prohibited goods having an ultimate enemy destination.

Situation II

INDEPENDENT PHILIPPINE ISLANDS

States X and Y are at war. Other states are neutral.

Admitting that the Philippine Islands have been granted independence under the provisions of the proposed Act of January 17, 1933,[1] how should a seaplane of state X, which is under its own power and not dependent upon any ship, be regarded and what should be its treatment after arrival in the Port of Manila.

(*a*) By the Philippine Government?

(*b*) By the *Yamba*, a vessel of war of state Y which has been in Manila 20 hours?

(*c*) By the *Namba*, a vessel of war of state N, which is convoying merchant vessels of neutral states?

(*d*) By the *Usa*, a vessel of war of the United States?

SOLUTION

1. In case the Philippine Islands obtain independence and are not neutralized:

(*a*) The Philippine Government should intern the seaplane.

(*b*) The *Yamba* may request assurances from the Philippine Government to the effect that the seaplane has been or immediately will be interned.

(*c*) The *Namba* may inquire whether the seaplane has been or immediately is to be interned and may govern its movements accordingly.

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[1] This act was rejected by resolution of the Philippine Legislature October 17, 1933, and the act of March 24, 1934, was accepted by a resolution of May 1, 1934. These acts are printed at the end of the discussion of this Situation II. See post pp. 111, 127.

(*d*) The *Usa* has no legal concern with the matter.

2. In case the Philippine Islands are neutralized:

(*a*) The Philippine Government should intern the seaplane.

(*b*) If state Y is a party to the neutralization treaty, the *Yamba* may perform such services as rest upon that vessel under the treaty but if state Y is not a party to the treaty, even though other states may be parties, the *Yamba* may request assurances from the Philippine Government to the effect that the seaplane has been or immediately will be interned.

(*c*) If state N is a party to the neutralization treaty, the *Namba* may perform such services as rest upon that vessel under the treaty but if state N is not a party to the treaty even though other states may be parties, the *Namba* may inquire whether the seaplane has been or immediately is to be interned and may govern its movements accordingly.

(*d*) If the United States is, as may be inferred from the Act of January 17, 1933, a party to the treaty of neutralization, the *Usa* may perform such services as rest upon that vessel under the treaty but if the United States is not a party, even though other states may be parties, the *Usa* has no legal concern with the matter.

NOTES [1]

Independence of Philippine Islands.—If section 10 of the Act of January 17, 1933, had been brought into effect by a favorable vote instead of being defeated by an unfavorable vote, conditions would have implied a considerable change in the conduct of American affairs in the western Pacific Ocean. By this act the Philippine Islands were to become "a separate and self-governing nation" and their officials were to become "officers of the free and independent government of the Philippine Islands." The

[1] These notes were based upon the hypothesis admitting independence under provisions of the act of January 17, 1933. Section 11, in regard to neutralization, is identical in the act of 1933 and in the act of 1934.

President of the United States is requested at the earliest practicable date to open negotiations with foreign powers looking to the perpetual neutralization of the Islands. This date might presumably be as soon as the vote favorable to independence under conditions of the 1933 act had been taken with view to launching the Commonwealth of the Philippine Islands as a perpetually neutralized state.

Independence and neutralization.—By section 10 of the Act of January 17, 1933, the independence of the Philippine Islands was to be recognized 10 years after the new government under the constitution should be set up and all sovereignty of the United States was to be withdrawn. Under section 12, the President of the United States was to invite other states to recognize the independence of the Islands. This independence does not seem to be dependent upon the neutralization of the Islands though the wording of section 11 seems to anticipate that the negotiation of a neutralization treaty may precede independence. By this section, the President is requested "at the earliest practicable date" to negotiate for neutralization, "if and when Philippine independence shall have been achieved."

Situation II may therefore be considered from two points of view, i.e., the Philippine Islands may be independent and neutralized or the Philippine Islands may be independent but not neutralized.

Neutralization agreements.—Neutralization agreements have long been common and often have been regarded as satisfactory methods of solving perplexing or otherwise insolvable difficulties. Broadly these agreements have been unilateral or multilateral, i.e., one or more states have signed an agreement to the effect that each would respect the neutrality of a named area or entity, or states have agreed with one another that they would maintain the neutrality of a named area or entity.

Neutralization.—Some type of neutralization has often been resorted to when a state or states may be uncertain as to the immediate policy to be pursued in regard to the

subject of neutralization. Often there has been created by the adoption of the phrase in conventional framework a sense of security which subsequent events have shown to be visionary. Like other international agreements, however, the relations depend upon the nature of the obligations assumed. Many of the treaties and conventions providing for neutralization fix the period as "in perpetuity", "forever", "lasting", etc. A review of these treaties shows that these words have been very loosely used. Even the clause of the Treaty of Vienna, 1815, relating to neutralization was not strictly observed. The provisions were that "the town of Cracow, with its territory, is declared to be forever a free, independent, and strictly neutral city, under the protection of Austria, Russia and Prussia", with the further provision that "the Courts of Russia, Austria, and Prussia engage to respect and to cause to be always respected, the neutrality of the free town of Cracow and its territory." The action of these powers in 1846 in annexing this territory to Austria showed that such terms as "forever" and "always" were not to be taken literally. Action under other similar treaties shows that "perpetual" and like words used in neutralization agreements implies that no predetermined date has been fixed upon for termination of the neutralized status and little more. It is a fact that Switzerland has been considered as neutralized and that at Paris, November 20, 1815, Austria, France, Great Britain, Prussia and Russia, acknowledged, "in the most formal manner, by the present act that the neutrality and inviolability of Switzerland and her independence of all foreign influence, enter into the true interests of the policy of the whole of Europe." Switzerland has, however, from time to time as wars arose informed the foreign powers that the government would "maintain and defend" her neutrality by all the means in her power and Switzerland has ordinarily had a well-trained army.

Luxemburg neutralized under the Great Powers in 1867 and without defenses was a matter of controversy during the Franco-Prussian War, 1870, and overrun during the World War, troops entering as early as August 2, 1914. Lord Stanley, who had participated in the negotiation of the treaty in regard to the neutralization of Luxemburg, said of the obligation, "Such a guarantee has obviously rather the character of a moral sanction to the arrangements which it defends than that of a contingent liability to make war."

In the treaty of 1831 in regard to Belgium, it was agreed that it "shall form an independent and perpetually neutral state" and this was reaffirmed in 1839. In the Franco-Prussian War, however, Great Britain made treaties with France and with Prussia to the effect that if either should violate Belgian territory, Great Britain would for the defense of Belgium go in on the side of the other. Whether the simple moral sanction would have been sufficient to secure respect for the Belgian neutrality seems at least to have been doubted by the three powers parties to these treaties of 1870. Their doubts seem to have been justified by events of 1914.

It would seem from instances of neutralization that the risks consequent upon violation of neutralization agreements should be at least commensurate to the advantages which might be anticipated from disregard of these agreements as such sanctions only have proven effective.

Belgian position, 1914.—Belgium was in early 1914 under the provisions of the neutralization treaty, but had maintained an army and fortifications. The note communicated to the German Minister by the Belgian Minister of Foreign Affairs, M. Davignon, on August 3, 1914, at 7 a.m. shows the official attitude toward the condition that had arisen as follows:

> The German Government stated in their note of August 2, 1914, that according to reliable information French forces intended to march on the Meuse via Givet and Namur, and that Belgium,

in spite of the best intentions, would not be in a position to repulse, without assistance, an advance of French troops.

The German Government, therefore, considered themselves compelled to anticipate this attack and to violate Belgian territory. In these circumstances, Germany proposed to the Belgian Government to adopt a friendly attitude toward her, and undertook, on the conclusion of peace, to guarantee the integrity of the Kingdom and its possessions to their full extent. The note added that if Belgium put difficulties in the way of the advance of German troops, Germany would be compelled to consider her as an enemy, and to leave the ultimate adjustment of the relations between the two States to the decision of arms.

This note has made a deep and painful impression upon the Belgian Government.

The intentions attributed to France by Germany are in contradiction to the formal declarations made to us on August 1, in the name of the French Government.

Moreover, if, contrary to our expectation, Belgian neutrality should be violated by France, Belgium intends to fulfil her international obligations and the Belgian army would offer the most vigorous resistance to the invader.

The treaties of 1839, confirmed by the treaties of 1870, vouch for the independence and neutrality of Belgium under the guarantee of the powers, and notably of the Government of His Majesty the King of Prussia.

Belgium has always been faithful to her international obligations, she has carried out her duties in a spirit of loyal impartiality and she has left nothing undone to maintain and enforce respect for her neutrality.

The attack upon her independence with which the German Government threaten her constitutes a flagrant violation of international law. No strategic interest justifies such a violation of law.

The Belgian Government, if they were to accept the proposals submitted to them, would sacrifice the honor of the nation and betray their duty toward Europe.

Conscious of the part which Belgium has played for more than 80 years in the civilization of the world, they refuse to believe that the independence of Belgium can only be preserved at the price of the violation of her neutrality.

If this hope is disappointed the Belgian Government are firmly resolved to repel, by all the means in their power, every attack upon their rights. (1917 Naval War College, International Law Documents, p. 53.)

The next day the German Minister was handed his passports and the British, French, and Russian ministers were "as guaranteeing powers" requested to cooperate in the defense of Belgian territory.

On August 4, all Belgian diplomatic representatives abroad were instructed to bring the action of their government to the attention of the states to which they were accredited.

A few days later the hope was officially expressed that the regime of neutralization would be permitted to continue in the Belgian dependencies in Africa particularly referring to the General Act of the Berlin Conference signed February 26, 1885, and article 11.

When the Austro-Hungarian declaration of war was received, the Belgian Government replied, August 29, 1914, in a manner showing recognition of Belgian obligations under the treaty of neutralization, saying,

> Belgium has always entertained friendly relations with all her neighbors without distinction. She had scrupulously fulfilled the duties imposed upon her by her neutrality. If she has not been able to accept Germany's proposals, it is because these proposals contemplated the violation of her engagements toward Europe, engagements which form the conditions of the creation of the Belgian Kingdom. She has been unable to admit that a people, however weak they may be, can fail in their duty and sacrifice their honor by yielding to force. The government have waited, not only until the ultimatum had expired, but also until Belgian territory had been violated by German troops, before appealing to France and Great Britain, guarantors of her neutrality, under the same terms as are Germany and Austria-Hungary, to cooperate in the name and in virtue of the treaties in defense of Belgian territory. By repelling the invaders by force of arms, she has not even committed an hostile act as laid down by the provisions of article 10 of the Hague Convention respecting the rights and duties of neutral powers.
>
> Germany herself has recognized that her attack constitutes a violation of international law, and, being unable to justify it, she has pleaded her strategical interests.
>
> Belgium formally denies the allegation that Austrian and Hungarian nationals have suffered treatment in Belgium contrary to the most primitive demands of humanity. (Ibid., p. 58.)

Neutralization of the Philippine Islands.—As under section 11 of the Act of January 17, 1933, the President of the United States is requested to enter upon negotiations for the neutralization of the Philippine Islands, the American Government would naturally be supposed to have a plan to suggest and to be prepared to become a party to the "perpetual neutralization." The negotiation is not by the Act restricted to any specified powers but would seem to imply that the invitation to negotiate might be to all powers desiring to take part in the negotiation, at least, the powers mentioned in section 12, viz: those in diplomatic correspondence with the United States would expect to be invited as these are to be invited to recognize the independence of the Philippine Islands when it is attained.

There would be certain complications owing to existing treaties in regard to relations in the western Pacific. The Washington Conference of 1921–22 was not merely upon limitation of armament but also according to the official agenda upon Pacific and Far Eastern questions. It was recognized in this Conference that naval power might be conditioned on other factors than ships and article XIX of the Treaty Limiting Naval Armament contained the following provisions:

> The United States, the British Empire and Japan agree that the status quo at the time of the signing of the present Treaty, with regard to fortifications and naval bases, shall be maintained in their respective territories and possessions specified hereunder.
>
> (1) The insular possessions which the United States now holds or may hereafter acquire in the Pacific Ocean, except (*a*) those adjacent to the coast of the United States, Alaska and the Panama Canal Zone, not including the Aleutian Islands, and (*b*) the Hawaiian Islands;
>
> (2) Hongkong and the insular possessions which the British Empire now holds or may hereafter acquire in the Pacific Ocean, east of the meridian of 110° east longitude, except (*a*) those adjacent to the coast of Canada, (*b*) the Commonwealth of Australia and its Territories, and (*c*) New Zealand;
>
> (3) The following insular territories and possessions of Japan in the Pacific Ocean, to wit; the Kurile Islands, the Bonin Islands,

Amami-Oshima, the Loochoo Islands, Formosa and the Pescadores, and any insular territories or possessions in the Pacific Ocean which Japan may hereafter acquire.

The maintenance of the status quo under the foregoing provisions implies that no new fortifications or naval bases shall be established in the territories and possessions specified; that no measures shall be taken to increase the existing naval facilities for the repair and maintenance of naval forces, and that no increase shall be made in the coast defences of the territories and possessions above specified. This restriction, however, does not preclude such repair and replacement of worn-out weapons and equipment as is customary in naval and military establishments in time of peace. (1921 Naval War College, International Law Documents, p. 301.)

If the neutralization of the Philippine Islands takes place, it will evidently be of an area of which the military status is already subject to international restriction. Subject to these restrictions the Philippine Islands would be unable to establish any very strong military power. The withholding of the military and naval bases limited to the strength of February 6, 1921, would scarcely be of great value to the United States as these areas would be open to attack and occupation by any enemy in time of war while adjacent Philippine areas would be neutralized.

American commitments in the Philippines.—Under article 3 of the Treaty of 1898, Spain ceded to the United States the Philippine Islands and the United States paid Spain $20,000,000. Under other articles of this treaty Spanish ships and merchandise were for a period of ten years to be admitted to the Islands on the same terms as American, the return of prisoners of war and disposition of other persons were provided for, outstanding claims were allocated, and all public properties of Spain such as buildings, wharves, military structures, public highways, and other immovable property passed to the United States.

At the Washington Conference of Limitation of Naval Armament, 1921, Japan wished assurances as to the attitude of the United States and Great Britain toward

increase of fortifications and naval bases in the Pacific. After discussion, article XIX, mentioned above, was inserted in the Treaty Limiting Naval Armament. How far such a restriction would be embodied in any agreement setting up a Philippine state should be a matter of careful consideration.

Under the Act of January 17, 1933, the proposal of section 5 was that "land or other property" which had been designated by the President of the United States for military and other reservations of the Government of the United States should not pass to the Philippine Government, and may be redesignated by the President within 2 years after the proclamation of withdrawal of the sovereignty of the United States. If neutralization should take place under section 11 of the Act, the value to the United States of military bases in the status quo of 1922 in a foreign state would be doubtful.

Neutralization of Panama Canal.—In the preamble of the treaty between the United States and Great Britain, 1901, regarding the Panama Canal mention is made of the "general principle" of neutralization and in article 3 this is referred to as substantially that "embodied in the Convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal," viz:

1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

2. The canal shall never be blockaded, nor shall any right of war be exercised nor any act of hostility be committed within it. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.

3. Vessels of war of a belligerent shall not revictual nor take any stores in the canal except so far as may be strictly necessary; and the transit of such vessels through the canal shall be effected with the least possible delay in accordance with the regulations

in force, and with only such intermission as may result from the necessities of the service.

Prizes shall be in all respects subject to the same rules as vessels of war of the belligerents.

4. No belligerent shall embark or disembark troops, munitions of war, or warlike materials in the canal, except in case of accidental hindrance of the transit, and in such case the transit shall be resumed with all possible dispatch.

5. The provisions of this article shall apply to waters adjacent to the canal, within 3 marine miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than 24 hours at any one time, except in case of distress, and in such case, shall depart as soon as possible; but a vessel of war of one belligerent shall not depart within 24 hours from the departure of a vessel of war of the other belligerent.

6. The plant, establishments, buildings, and all work necessary to the construction, maintenance, and operation of the canal shall be deemed to be part thereof, for the purposes of this treaty, and in time of war, as in time of peace, shall enjoy complete immunity from attack or injury by belligerents, and from acts calculated to impair their usefulness as part of the canal. (32 U.S.Stat., Pt. II, pp. 1903, 1904.) (1929 Naval War College, International Law Situations, p. 22.)

Neutralization of Aaland Islands, 1921.—One of the more recent conventions relating to neutralization was that in regard to the Aaland Islands signed by the states bordering on the Baltic and by British and Italian representatives, October 22, 1921. This convention, which defines the area of the Aaland Islands in article 2, had as its object "the nonfortification and neutralization of the Aaland Islands in order that these islands may never become a cause of danger from the military point of view" and for the maintenance of this aim the powers may individually or jointly ask the Council of the League of Nations to decide upon the measures to be taken and the parties to the convention agree to assist in these measures. The method of determining upon the measures was outlined as follows:

When, for the purposes of this undertaking, the Council is called upon to make a decision under the above conditions, it will invite the Powers which are parties to the present Conven-

tion, whether Members of the League or not, to sit on the Council. The vote of the representative of the Power accused of having violated the provisions of this Convention shall not be necessary to constitute the unanimity required for the Council's decision.

If unanimity cannot be obtained, each of the High Contracting Parties shall be entitled to take any measures which the Council by a two-thirds majority recommends, the vote of the representative of the Power accused of having violated the provisions of this Convention not being counted. (1924 Naval War College, International Law Documents, p. 59.)

That the high contracting parties "undertake to assist" or are "entitled to take any measures which the Council by a two-thirds majority recommends" does not necessarily commit any of the high contracting parties to any predetermined action as, these powers would be members of the council for deciding the measures to be taken.

The Aaland Islands remain an integral part of the Republic of Finland and Finland may take measures for the defense of the neutrality of the islands and of the Finnish mainland in case of sudden attack and pending intervention by the high contracting parties under terms of the convention.

Civil and military aircraft.—In 1919 a convention for the regulation of aerial navigation was signed at Paris. The general provisions of this convention have been approved and have been embodied in other agreements and proposed agreements. Distinction was made between private and state aircraft and also in the categories of state aircraft. Some restrictions were also imposed upon aircraft.

ART. 30. The following shall be deemed to be State aircraft:

(*a*) Military aircraft.

(*b*) Aircraft exclusively employed in State service, such as posts, customs, police.

Every other aircraft shall be deemed to be a private aircraft.

All state aircraft other than military, customs and police aircraft shall be treated as private aircraft and as such shall be subject to all the provisions of the present Convention.

ART. 31. Every aircraft commanded by a person in military service detailed for the purpose shall be deemed to be a military aircraft.

ART. 32. No military aircraft of a contracting State shall fly over the territory of another contracting State nor land thereon without special authorisation. In case of such authorisation the military aircraft shall enjoy, in principle, in the absence of special stipulation the privileges which are customarily accorded to foreign ships of war.

A military aircraft which is forced to land or which is requested or summoned to land shall by reason thereof acquire no right to the privileges referred to in the above paragraph.

ART. 33. Special arrangements between the States concerned will determine in what cases police and customs aircraft may be authorised to cross the frontier. They shall in no case be entitled to the privileges referred to in Article 32. (XI League of Nations Treaty Series, p. 173 (1922).)

These principles, somewhat elaborated, formed a part of the rules drawn up at The Hague in 1923 as is stated in the report of the Commission. It was recognized, however, that "a clear distinction must be made between aircraft that form a part of the combatant forces in time of war and those which do not." Accordingly a rule was drawn up as article 3 that "A military aircraft shall bear an external mark indicating its nationality and military character" while article 5 stated, "Public non-military aircraft other than those employed for customs or police purposes shall in time of war bear the same external marks, and for the purposes of these rules shall be treated on the same footing, as private aircraft." (1924 Naval War College, International Law Documents, p. 110.)

Seaplanes and neutral waters.—It is admitted in all proposed regulations that aircraft in distress may enter neutral jurisdiction. Red Cross aircraft are also permitted to enter, as are aircraft on board ships of war.

It has further been generally held that an aircraft taking off from a vessel of war within neutral waters or entering the neutral aerial jurisdiction is liable to internment.

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The report of the Commission of Jurists at The Hague, in 1923, stated that,

> The obligation on the part of the neutral Power to intern covers not only the aircraft, but its equipment and contents. The obligation is not affected by the circumstances which led to the military aircraft coming within the jurisdiction. It applies whether the belligerent aircraft entered neutral jurisdiction, voluntarily or involuntarily, and whatever the cause. It is an obligation owed to the opposing belligerent and is based upon the fact that the aircraft has come into an area where it is not subject to attack by its opponent. * * *
>
> The obligation to intern belligerent military aircraft entering neutral jurisdiction entails also the obligation to intern the personnel. These will in general be combatant members of the belligerent fighting forces, but experience has already shown that in time of war military aeroplanes are employed for transporting passengers. As it may safely be assumed that in time of war a passenger would not be carried on a belligerent military aircraft unless his journey was a matter of importance to the Government, it seems reasonable also to comprise such passengers in the category of persons to be interned.

"ARTICLE 42.

"A neutral Government shall use the means at its disposal to prevent the entry within its jurisdiction of belligerent military aircraft and to compel them to alight if they have entered such jurisdiction.

"A neutral Government shall use the means at its disposal, to intern any belligerent military aircraft which is within its jurisdiction after having alighted for any reason whatsoever, together with its crew and the passengers, if any." (1924 Naval War College, International Law Documents, p. 133.)

Article 46 of these rules speaks of "departure by air of any aircraft." Whether a seaplane arriving and departing by water would receive different treatment is not stated. It might be queried whether aerial or maritime navigation is the auxiliary or principal fact in use of a hydroplane. Article 42 apparently is drawn with reference to aircraft which in flight enter neutral jurisdiction, though the second paragraph might strictly be extended to a seaplane which had alighted outside and navigated within neutral jurisdiction.

German protest to United States, 1915.—In a communication of the German Ambassador, J. Bernstorff, of January 19, 1915, to the Secretary of State, there was mentioned certain data which the Ambassador understood to be reliable in regard to hydro-aeroplanes. In concluding, the Ambassador said,

> There is no doubt that hydro-aeroplanes must be regarded as war vessels whose delivery to belligerent states by neutrals should be stopped under Article 8 of the thirteenth convention of the Second Hague Conference of October 18, 1907. [Art. 8. A neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of every vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a Power with which that Government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of every vessel intended to cruise, or engage in hostile operations, which has been, within the said jurisdiction, adapted, entirely or in part, for use in war.] Hydro-aeroplanes are not mentioned by name in the convention simply because there was none in 1907 at the time of the conference.
>
> On the supposition that hydro-aeroplanes are delivered to belligerents against the wishes of the Government of the United States, I have the honor to bring the foregoing to your excellency's kind knowledge. (1915 U.S. Foreign Relations, Supplement, p. 776.)

To this communication the Secretary of State made a somewhat full reply on January 29, 1915:

> EXCELLENCY: I have the honor to acknowledge the receipt of your excellency's note of the 19th instant, and in reply have to inform you that the statements contained in your excellency's note have received my careful consideration in view of the earnest purpose of this Government to perform every duty which is imposed upon it as a neutral by treaty stipulation and international law.
>
> The essential statement in your note, which implies an obligation on the part of this Government to interfere in the sale and delivery of hydro-aeroplanes to belligerent powers, is:
>
> "There is no doubt that hydro-aeroplanes must be regarded as war vessels whose delivery to belligerent states by neutrals should be stopped under Article 8 of the thirteenth convention of the Second Hague Conference of October 18, 1907."

As to this assertion of the character of hydro-aeroplanes I submit the following comments: The fact that a hydro-aeroplane is fitted with apparatus to rise from and alight upon the sea does not in my opinion give it the character of a vessel any more than the wheels attached to an aeroplane fitting it to rise from and alight upon land give the latter the character of a land vehicle. Both the hydro-aeroplane and the aeroplane are essentially aircraft; as an aid in military operations they can only be used in the air. The fact that one starts its flight from the surface of the sea and the other from the land is a mere incident which in no way affects their aerial character.

In view of these facts I must dissent from your excellency's assertion that "there is no doubt that hydro-aeroplanes must be regarded as war vessels," and consequently I do not regard the obligations imposed by treaty or by the accepted rules of international law applicable to aircraft of any sort.

In this connection I further call to your excellency's attention that according to the latest advices received by this Department the German Imperial Government include "balloons and flying machines and their component parts" in the list of conditional contraband, and that in the Imperial prize ordinance, drafted September 30, 1909, and issued in the Reichs-Gesetzblatt on August 3, 1914, appear as conditional contraband "airships and flying machines" (Article 23, section 8). It thus appears that the Imperial Government have placed and still retain aircraft of all descriptions in the class of conditional contraband, for which no special treatment involving neutral duty is, so far as I am advised, provided by any treaty to which the United States is a signatory or adhering power.

As in the views of this Department the provisions of Convention XIII of the Second Hague Conference do not apply to hydro-aeroplanes I do not consider it necessary to discuss the question as to whether those provisions are in force during the present war. (Ibid., p. 780.)

Probably the statement of the Secretary of State that he did "not regard the obligations imposed by treaty or by the accepted rules of international law applicable to aircraft of any sort" was to be taken merely as emphasizing his interpretation of neutral obligations as regards this particular case rather than as regards all possible cases.

Analogy of aerial and maritime rules.—It has often been maintained that aerial and maritime rules should

be the same. Many of these ideas are due to the use for aircraft of the same words and phrases that are used for marine craft. Such words as ships, navigation, landing, pilots, registry, papers, right-of-way, etc., are in the marine and aerial vocabularies but the application may be quite unlike.

The analogy fails when consideration is given to the nature of ships of the sea and of the air, speed and range of navigation, place of landing, use of pilots, etc. These differences must be taken into the reckoning when the responsibility of the neutral is to be estimated even under the rule of due diligence.

Due diligence as to aircraft.—The rule requiring of a neutral state exercise of due diligence in maintaining its neutrality has been interpreted as obliging the neutral state to use the "means at its disposal." If the interpretation put upon the words, "due diligence", in the Alabama case, i.e. diligence in "exact proportion to the risks which either of the belligerents may be exposed from failure to fulfill the obligations of neutrality" is to be applied to aircraft, the safe rule would be to prohibit under liability to internment the entrance of aircraft to neutral jurisdiction.

The risk from the entrance to neutral territory of belligerent land forces entails internment for the period of the war. Under certain conditions the internment of vessels of a belligerent may be necessary in order that neutrality may be maintained but ordinarily the movements of vessels are sufficiently under control so that neither belligerent is prejudiced unduly if a degree of equality in granting privileges essential to keep the vessels seaworthy is granted. The risk from aircraft is relatively so much greater that the neutral has forbidden entrance to neutral jurisdiction under penalty of internment except to hospital aircraft.

Naval War College opinion, 1912.—While aircraft had been only moderately developed before 1912, the Naval War College had given attention to certain aspects of

aerial navigation. In referring to the analogy of taking coal for naval vessels and gas for balloons, in the Situations for 1912 it was said,

> Even with this extension of the right of coaling, the entrance of a balloon into neutral territory may be in marked contrast to the entrance of a vessel of war into a neutral port. One belligerent may easily learn of the entrance of a vessel of his enemy to a neutral port. The course which the vessel will follow on departure, the time of sojourn, and other facts may be reasonably determined. A vessel in a neutral port must ordinarily put to sea before reaching a home or an enemy port. A belligerent would ordinarily, therefore have an opportunity to meet and to engage the vessel of his opponent in an area where battle is lawful and without material risk to the neutral.
>
> It is possible, however, that the territory of States might be so situated that a neutral State might be directly between the two belligerents; e.g., if war existed between Germany and Spain. In such a case would the bringing of a war balloon to the French frontier from Germany place France under any obligation to permit the balloon to enter and take the necessary gas to make it navigable? If German balloons were permitted to enter French territory, take gas, and from points of advantage attack Spanish forces and territory, would such permission by France be analogous to the entrance of German troops, or would it be the use of French territory as a base? Whether or not the right of absolute sovereignty in the air is in the subjacent State, certainly France would be under no obligation to receive a German war balloon into its territory when France is neutral except on ground of humanity or *vis major*. France could scarcely permit German war balloons to use French territory as a point from which to attack Spain, and if German forces should enter French territory internment would be the penalty. (1921 Naval War College, International Law Situations, p. 85.)

It was at that time pointed out that the situation would be modified if the aircraft maintained continuous physical contact and was appurtenant to a cruiser or similar vessel.

Hague rules, 1923.—The Commission of Jurists to Consider and Report upon the Rules of Warfare which was appointed under provisions of a resolution of the Washington Conference of 1922 reported upon radio and aircraft in 1923. In this report it was said,

No attempt has been made to formulate a definition of the term "aircraft," nor to enumerate the various categories of machines which are covered by the term. A statement of the broad principle that the rules adopted apply to all types of aircraft has been thought sufficient, and article 1 has been framed for this purpose.

"ARTICLE 1

"The rules of aerial warfare apply to all aircraft, whether lighter or heavier than air, irrespective of whether they are, or are not, capable of floating on the water." (1924 Naval War College, Int. Law Documents, p. 108.)

While these rules have not been ratified, they embodied the opinion of the delegates from six naval powers and are therefore worthy of careful consideration.

Dependent aircraft.—It has gradually become customary to add to the naval fighting forces aircraft carriers or vessels having facilities for carriage of aircraft. For some years it had generally been the rule that such aircraft should be regarded while on the ship as part of the ship. This matter had been considered at The Hague in 1923 and the Report of the Commission explains that,

The customary rules of international law authorise the admission of belligerent warships to neutral ports and waters. There is no obligation upon neutral States to admit warships belonging to belligerent States, but it is not in general refused. The admission of belligerent military aircraft, however, is prohibited by article 40, and account must therefore be taken of the fact that it has now become the practice for warships to have a certain number of aircraft assigned to them and that these aircraft usually rest on board the warship. While they remain on board the warship they form part of it, and should be regarded as such from the point of view of the regulations issued by the neutral States. They will therefore be allowed to enter the neutral jurisdiction on the same footing as the warship on board which they rest, but they must remain on board the warship and must not commit any act which the warship is not allowed to commit.

"ARTICLE 41.

"Aircraft on board vessel of war, including aircraft-carriers, shall be regarded as part of such vessels." (1924 Naval War College, Int. Law Documents, p. 131.)

Aircraft over neutral jurisdiction.—The practice and general opinion before the end of the World War supported the right of a neutral state to exclude all belligerent aircraft from the air above its land. Aircraft were generally excluded from air above the land by proclamation or decree of some kind. The early ordinance of Switzerland, August 4, 1914, was explicit as to the right of the Swiss Government to control this aerial space.

17. As to aviation, attention will be given to what follows:

(*a*) Balloons and air craft not belonging to the Swiss Army can not rise and navigate in the aerial space situated above our territory unless the persons ascending in the apparatus are furnished with a special authorization, delivered in the territory occupied by the army, by the commander of the army; in the rest of the country, by the Federal military department;

(*b*) The passage of all balloons and air craft coming from abroad into our aerial space is forbidden. It will be opposed if necessary by all available means and these air craft will be controlled whenever that appears advantageous.

(*c*) In case of the landing of foreign balloons or air craft, their passengers will be conducted to the nearest superior military commander who will act according to his instructions. The apparatus and the articles which it contains ought, in any case, to be seized by the military authorities or the police. The Federal military department or the commander of the army will decide what ought to be done with the personnel and material of a balloon or air craft coming into our territory through *force majeure* and when there appears to be no reprehensible intention or negligence. (1916 Naval War College, International Law Topics, p. 73.)

The Proclamation of the United States in regard to the Panama Canal Zone and the cities and harbors of Panama and Colon was comprehensive:

Rule 15.—Air craft of a belligerent power, public or private, are forbidden to descend or arise within the jurisdiction of the United States at the Canal Zone, or to pass through the air

spaces above the lands and waters within said jurisdiction. (1915 Naval War College, International Law Topics, p. 14.)

Internment.—Internment of vessels of war is a relatively modern practice. It first became generally recognized in the Russo-Japanese War in 1904–05. The Hague Convention respecting the Rights and Duties of Neutral Powers in Maritime Law of 1907, Article 24, stated the right of internment and outlined the procedure of internment. Provision was made for interning vessels of war in many of the neutrality proclamations and regulations during the World War.

The analogous principle had been earlier applied to belligerent land forces entering upon neutral territory.

The internment of aircraft unless attached to a vessel was the rule during the World War and prohibitions of flight over neutral jurisdiction were common as in the Italian decree of September 3, 1914.

ARTICLE 1. It is forbidden for any apparatus or means of aerial locomotion, such as dirigibles, aeroplanes, hydroplanes, balloons, flying kites, or captive balloons, etc., to fly or ascend over any points of territory of the state or colonies or of the territorial seas, except for those established by military authorities and for other aeronautics that are authorized from time to time by the ministers of war and navy. No permission will be granted to any foreigners.

Aircraft and outbreak of World War.—When the German Ambassador withdrew from Paris, August 3, 1914, he said in his letter to the President of the Council, M. Viviani:

The German administrative and military authorities have established a certain number of flagrantly hostile acts committed on German territory by French military aviators. Several of these have openly violated the neutrality of Belgium by flying over the territory of that country; one has attempted to destroy buildings near Wesel; others have been seen in the district of the Eifel; one has thrown bombs on the railway near Carlsruhe and Nuremberg.

I am instructed, and I have the honor to inform your excellency that in the presence of these acts of aggression the German Empire considers itself in a state of war with France in consequence of the acts of this latter power. (1917 Naval War College, International Law Documents, p. 103.)

In the reply M. Viviani said,

I formally challenged the inaccurate allegations of the Ambassador, and for my part I reminded him that I had yesterday addressed to him a note protesting against the flagrant violations of the French frontier committed two days ago by detachments of German troops. (French Yellow Book, No. 148.)

Proclamation of United States, February 28, 1918.—Soon after the United States entered the World War as a belligerent, it found problems arising from the use of aircraft and on February 28, 1918, a proclamation was issued requiring license from government authorities for any person flying over certain areas, and no private flying was to be permitted after 30 days from February 28. (40 U.S.Stat., Pt. 2, 1753). The presumption would under such circumstances be that all aircraft of the registry of the United States would from that date be public aircraft and liable to be treated accordingly.

Spaight's opinion.—J. M. Spaight who has given much attention to laws relating to aircraft gives certain practical arguments for refusal of entrance to belligerent aircraft within neutral jurisdiction.

The pre-war argument for refusing to belligerent aircraft the right to circulate in neutral atmosphere, namely, that such a right must be accorded to both or neither of the belligerents, and that if accorded to both there must always be the danger of conflicts above neutral soil, with consequent danger to life and property below, received a concrete confirmation in an occurrence of the war. In December, 1917, it was reported that an aerial combat took place over Swiss territory, and that as a result a good deal of damage was caused near Muttenz by the fall of bombs. Other combats also occurred over neutral territory—over Aardenburg (Zeeland), for instance, in January, 1918; over Cadzand in April, 1918; and over Ameland in July, 1918. The fact that such incidents can occur is the best answer to the question which has been asked—Why should not the maritime rule of entry of neutral jurisdiction apply to aircraft? The answer is, in brief, that the circumstances are dissimilar, and that the practical objections to allowing entry of aircraft outweight any advantages that would result from applying the naval rule. The question has often been considered, and the general conclusion has been in favour of prohibition of entry. (Spaight, Air Power and War Rights, 2d ed., p. 422.)

Mr. Spaight also adds that exceptions to the prohibition of entrance should not be made and were not made on account of force majeure, error in crossing a neutral frontier or other reason. This position was embodied in the rules drawn up by the Commission of Jurists at The Hague in 1923 in article 40 which forbade to belligerent military aircraft entrance to neutral jurisdiction.

The 24-hour rule.—Gradually there evolved a rule that the same regulations should be applied by neutrals to the vessels of war of each belligerent sojourning in the neutral port. As vessels of war changed in character, there were varying proposals as to the length of time of permitted sojourn and of the interval between the sailing of vessels of different nationalities. Even during the World War distinctions among different types of vessels were for a time made. The Brazilian rules of August 4, 1914, contained the following provision:

> ART. 18th. If warships of two belligerents happen to be together in a Brazilian port or harbor, an interval of twenty-four hours shall elapse between the sailing of one of them and the sailing of her enemy, if both are steamers. If the first to sail is a sailing vessel and the next being an enemy is a steamer, three days' advance will be given to the first belligerent ship. Their time of sailing will be counted from their respective arrivals, exceptions being made for the cases in which a prolongation of stay may be granted. A belligerent ship of war cannot leave a Brazilian port before the departure of a merchant ship under an enemy flag, but must respect the aforesaid provisions concerning the intervals of departure between steamers and sailing vessels. (1916 Naval War College, International Law Topics, p. 12.)

The rule commonly called the 24-hour rule was generally accepted. By this rule 24 hours was the limit of sojourn of a belligerent vessel of war in a neutral port under ordinary circumstances and 24 hours must elapse between the departure of vessels of war of opposing belligerents. The reason for the establishing of this period was that neither belligerent should be able to obtain an advantage over the other by entering neutral

ports. It was thought 24 hours of sailing time would enable the leading vessel to reach a point where pursuit would be improbable.

The sailing distance of a surface vessel in 24 hours would, however, be a relatively short journey for an aircraft. It was early seen that the 24-hour rule would not be practicable as between aircraft and of little use between air and surface craft. The only safe rule for the neutral was soon discovered to be to prohibit entrance of aircraft and to intern any that transgressed this regulation.

Résumé.—While the final issue of the effort to adjust Philippine relations is still (1933) uncertain, the plan set forth in the Act of January 17, 1933, is one of the most definite thus far proposed and seriously considered. This plan would specially involve the viewing of the Act from three points of view, the attitude and consequences for (1) the United States; (2) the Philippine Islands; and (3) other states.

The United States has in passing the Act of January 17, 1933, over the President's veto, presumably set forth the policy which it is willing to pursue. This involves independence for the Islands after 10 years under specified conditions.

The Philippine Legislature has in failing to approve the conditions in the Act of January 17, 1933, indicated that the conditions are unsatisfactory and subsequently that certain amendments in the act were essential.

Other states would be interested in any changes which might be made in the status of the Philippine Islands because introducing new factors into the international politics of the Pacific and Far East, where conditions are already uncertain. While some form of neutralization might involve less serious problems for a time than would independence without such an agreement, there are still many problems even under neutralization if precedents can be made a basis of judgment. Now the relations are between the United States and foreign powers. The ad-

ditional relations which would follow, if Philippine independence is established, would be these which arise when a new state enters the family of nations. If neutralization of the Philippine Islands eventuates, not merely the Islands enter new international relations but all the parties to the neutralization enter new relations to one another as well as to nonparticipating states.

Further, it may be questioned whether the Philippine Islands, on the frontier between the Eastern and Western Worlds, would feel assured of their independence without more definite sanctions than are ordinarily embodied in neutralization agreements. As states are not yet accustomed to follow altruistic policies, it is doubtful whether there would be sufficient advantages eventually flowing from the neutralization of the Islands to warrant commitments which might involve sacrifices on the part of the states whose participation would be essential for effective neutralization.

By the hypothesis of situation II the Philippine Islands have been granted their independence and this independence may or may not be accompanied by neutralization. If the Philippine Islands are not neutralized, all the rights and obligations of any state would reside in the Commonwealth of the Philippine Islands. As regards seaplanes, general practice seems to recognize that a great degree of risk is involved in their movements and that a neutral has a corresponding obligation in controlling their movements. Internment has come to be regarded as the proper course of action on the part of a neutral. Other states may justly condition their action to a reasonable degree upon the effectiveness of the action of the neutral.

If the Commonwealth of the Philippine Islands is neutralized, the respective states parties to the neutralization treaty will probably, judging from precedent, assume as little obligation as possible. The obligations of the Commonwealth of the Philippine Islands remain as would be the case without any neutralization treaty unless the treaty specifically provides otherwise.

SOLUTION

1. In case the Philippine Islands obtain independence and are not neutralized:

(*a*) The Philippine Government should intern the seaplane.

(*b*) The *Yamba* may request assurances from the Philippine Government to the effect that the seaplane has been or immediately will be interned.

(*c*) The *Namba* may inquire whether the seaplane has been or immediately is to be interned and may govern its movements accordingly.

(*d*) The *Usa* has no legal concern with the matter.

2. In case the Philippine Islands are neutralized:

(*a*) The Philippine Government should intern the seaplane.

(*b*) If state Y is a party to the neutralization treaty, the *Yamba* may perform such services as rest upon that vessel under the treaty, but if state Y is not a party to the treaty, even though other states may be parties, the *Yamba* may request assurances from the Philippine Government to the effect that the seaplane has been or immediately will be interned.

(*c*) If state N is a party to the neutralization treaty, the *Namba* may perform such services as rest upon that vessel under the treaty, but if state N is not a party to the treaty, even though other states may be parties, the *Namba* may inquire whether the seaplane has been or immediately is to be interned and may govern its movements accordingly.

(*d*) If the United States is, as may be inferred from the Act of January 17, 1933, a party to the treaty of neutralization, the *Usa* may perform such services as rest upon that vessel under the treaty, but if the United States is not a party, even though other states may be parties, the *Usa* has no legal concern with the matter.

Situation III

STRAITS IN PEACE AND WAR

The relations of adjacent states C and D are strained. Both states are parties to the Pact of Paris of August 27, 1928. A dispute in regard to the title of Narrow Island, 20 miles in length, having one end 1½ miles off the coast of state C and the other end 6 miles off the coast of state D, has continued since 1900. The strait between Narrow Island and the mainland widens to 12 miles in the middle and the navigable channel is within 2 miles of state C for 3 miles. Each state in 1933 lands forces on the nearer end of the island and vessels of war of each are at the respective ends of the strait between the island and mainland. The strait is the more convenient and commonly used though not the sole waterway in the region.

(1) Passage through the strait is refused by states C and D and their vessels of war threaten to maintain the closure.

The *Circa*, a vessel of war of state C, 5 miles to seaward of Narrow Island, orders the *Bara*, a merchant vessel of state B, not to use its radio for any purpose while in the neighborhood. The *Bara* insists upon proceeding through the strait and on the use of its radio.

(*a*) What are the rights of states C and D?

(*b*) What are the rights of other states?

(*c*) What are the rights of the *Bara*, both outside and within the strait?

(2) Later state D, maintaining that the action of state C already constitutes war, issues a declaration of war against state C.

State C then gives notice that, in self-defense, it has mined its end of the strait.

(*a*) What are the rights of states C and D?

(*b*) What are the rights of other states?

(*c*) What would be the rights of the *Bara* after the declaration?

SOLUTION

1. *In time of peace.*—(*a*) States C and D have no exceptional rights of jurisdiction over a strait along their coasts connecting generally used water areas, though states C and D may take action necessary for self-defense.

(*b*) Vessels of other states have the right of innocent passage through the strait but they are subject to reasonable regulations while within the territorial waters of C or D.

(*c*) The *Bara* as a merchant vessel of state B is entirely exempt from the jurisdiction of state C while on the high sea but must conform to the regulations of states C and D when within the jurisdiction of those states.

2. *In time of war.*—(*a*) States C and D have a right to regulate the use of their territorial waters and the waters within the immediate area of their operations.

(*b*) Vessels of neutral states have the right of innocent passage through the strait though they are subject to reasonable regulations while within the territorial waters of C or D. In view of the fact that the strait is not the sole but the more convenient and commonly used waterway, the rights of C or D may as an extreme measure extend to closing of the strait.

(*c*) After the declaration of war, the *Bara* as a merchant vessel of state B, is under obligation to observe the regulations of state C or D when within the territorial jurisdiction or the immediate area of the operation of their forces.

NOTES

Strained relations.—The relations between neighboring states are rarely such as to be without strain at

some point. The existence of such states as political entities is in itself an indication that the public well-being of each is viewed as somewhat different; otherwise they might unite.

One of the most frequent bases of differences between adjacent states has been in regard to boundaries or territorial claims. Frequently boundary conventions have been drawn up without adequate knowledge of the geography of the area involved and subsequent investigations have shown that the distinctive characteristics do not exist. Even mountain ranges and rivers in some cases have not been found within the area mentioned in a convention or not at the supposed location. Claims and counterclaims have easily arisen as settlers move into such areas or valuable deposits of minerals are found in the region. Even the mere desire on the part of a state to extend its territorial jurisdiction over barren or unoccupied territory may give rise to contention. Ethnic questions have often brought states into antagonism.

Strained relations is a term which has been used to indicate an attitude of opposition of states to one another in any degree short of war. Such relations often lead to war but are not war and the existence of these relations does not bring into operation the law of war.

The Pact of Paris.—The so-called "Pact of Paris" of August 27, 1928, or the Treaty for the Renunciation of War, grew out of the draft of a proposed bilateral pact of perpetual friendship between France and the United States which had been under consideration by the two powers from June, 1927. In the note of the American Secretary of State, December 28, 1927, advocating the extension of the treaty in such manner as to include the principal powers of the world, it was said that this would be "an impressive example to all other Nations of the world" in "condemning war and renouncing it as an instrument of national policy in favor of the pacific

73500—34——6

settlement of international disputes." The French reply of January 5, 1928, was that France was prepared to join the United States in renouncing "all war of aggression" in favor of employment of pacific means.

When in a note of January 11, 1928, the American Secretary of State raised question as to the proposal to limit the multilateral treaty to wars of aggression, the French Government replied that most of the principal powers were members of the League of Nations and

> They are already bound to one another by a Covenant placing them under reciprocal obligations, as well as by agreements such as those signed at Locarno in October 1925, or by international conventions relative to guaranties of neutrality, all of which engagements impose upon them duties which they can not contravene.
>
> In particular, Your Excellency knows that all states members of the League of Nations represented at Geneva in the month of September last, adopted, in a joint resolution tending to the condemnation of war, certain principles based on the respect for the reciprocal rights and duties of each. In that resolution the powers were led to specify that the action to be condemned as an international crime is aggressive war and that all peaceful means must be employed for the settlement of differences, of any nature whatsoever, which might arise between the several states. (Treaty for Renunciation of War. Text of the Treaty, Notes Exchanged, Instruments of Ratification, etc. U.S. Government Publication No. 468, p. 20.)

This note went even further and, proposing sanctions, said:

> The Government of the Republic has always, under all circumstances, very clearly and without mental reservation declared its readiness to join in any declaration tending to denounce war as a crime and to set up international sanctions susceptible of preventing or repressing it. (Ibid., p. 21.)

It was clearly stated that the Pact in no way "Either violates the specific obligations imposed by the Covenant or conflicts with the fundamental idea and purpose of the League of Nations. * * * If, however, such a declaration were accompanied by definitions of the word 'aggressor' and by exceptions and qualifications stipu-

lating when nations would be justified in going to war, its effect would be very greatly weakened and its positive value as a guaranty of peace virtually destroyed."

There was much correspondence upon the objects which the negotiators had in view, some of which were not susceptible of consistent interpretation with propositions made from time to time by the same writers. It was, however, clearly stated in the preliminary correspondence between the United States and France that the right of defense was not impaired. The condemnation of war as an instrument of national policy is understood "in other words as a means of carrying out their own spontaneous independent policy."

In transmitting its adherence to the Pact of Paris, the Union of Soviet Socialist Republics, M. Litvinoff, called attention to the strict interpretation of certain terms in the Pact.

> In considering the text of the pact the Soviet Government deems it necessary to point to the lack of plainness and clearness in article 1 of the very formula that forbids war, which is open to divergent and arbitrary interpretations. For its part, the Soviet Government believes that any international war must be forbidden either as an instrument of what is styled "national policy" or as a means to promote other ends (for instance the repression of movements for liberating peoples, etc.). In the opinion of the Soviet Government, it is necessary to forbid not only wars in a juridical and formal construction of the word (that is to say, assuming a "declaration of war," etc.) but also military actions such as, for instance, intervention, blockade, military occupation of foreign territories, of foreign ports, etc. The history of these last few years records quite a number of military actions of that kind which have brought upon peoples awful calamities. (Ibid., p. 269.)

The notes of the Union of Soviet Socialist Republics also referred to the British statement that there were

> Certain regions of the world the welfare and integrity of which constitute a special and vital interest for our peace and safety. His Majesty's Government have been at pains to make it clear in the past that interference with these regions cannot be suffered. Their protection against attack is to the British Empire

a measure of self-defence. It must be clearly understood that His Majesty's Government in Great Britain accept the new treaty upon the distinct understanding that it does not prejudice their freedom of action in this respect. The Government of the United States have comparable interests any disregard of which by a foreign Power they have declared that they would regard as an unfriendly act. His Majesty's Government believe, therefore, that in defining their position they are expressing the intention and meaning of the United States Government. (Ibid., p. 45.)

In regard to this position, the Union of Soviet Socialist Republics said,

If they are regions forming part of the British Empire or its Dominions, they are already all included in the pact, and the case of any aggression against them is provided for in the pact so that the reservation of the British Government in regard to them might seem to be at least superfluous. But if other regions are meant, the signatories of the pact have a right to know exactly where the freedom of action of the British Government begins and where it ends.

But the British Government reserves to itself full freedom of action not only in cases of armed aggression against those regions but even in cases of any act whatsoever of enmity or "of interference" which would justify the British Government in opening hostilities. Recognition of such a right for that Government would amount to justifying war and and might be taken as a contagious example to other signatories of the pact who, on the assumption that they have the same right, would also claim the same liberty with regard to other regions, and the result would be that there would probably be no place left on earth where the pact could be put in operation. Indeed, the restriction made by the British Government carries an invitation to another signatory of the pact to withdraw from its operation still other regions. The Soviet Government can not help regarding this reservation as an attempt to use the pact itself as an instrument of imperialistic policy. (Ibid., p. 271.)

Self-defense and treaties.—It scarcely needs argument to establish the fact that states do not negotiate a treaty to the end that their position in the world may be less favorable than when they were not parties to the treaty. The aim of many treaties according to their preambles is the maintenance of peace, the establishing of order and

justice, or mutual aid of some sort. While there are sometimes professions of aiming to promote the general good, it is usually in a direction closely related to the national good. This is particularly the case where treaties require for their operation the approval of some elective legislative body dependent upon majority vote. Sometimes such a body does approve a treaty that seems innocuous if it has a fair popular support. The same attitude is sometimes taken upon treaties which may do no harm, but possibly may be of advantage.

As self-defense is regarded as a fundamental right of a state, this right would be understood in no case to be abrogated without express provision. Certain prerequisites to the legitimate exercise of national forces for self-defense are often agreed upon such as conciliation, arbitration, etc.

Maritime jurisdiction in general.—In the International Law Situations of the Naval War College of 1928 (pp. 1–39), the general subject of maritime jurisdiction and the development of the law relating to maritime jurisdiction received quite full attention. This treatment showed that there had been many differences among states both in practice and theory and that there had been wide divergences in the opinions of writers. Controversies in regard to the control of the sea had been common for many centuries and claims to exclusive control of oceans had often been made. While from the days of Bynkershoek and the treaties of the early eighteenth century there was a tendency to adopt the cannon shot, at that time about 3 miles, as the limit of coast jurisdiction in adjacent waters, this was not uniformly accepted. The opinions of publicists, even in America, varied from time to time. Chancellor Kent considered that it would not be an unreasonable assumption for the United States to claim maritime jurisdiction "from quite distant headlines, as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the capes of the Delaware, and from the south cape of

Florida to the Mississippi. It is certain that our Government would be disposed to view with some uneasiness and sensibility, in the case of war between other maritime powers, the use of the waters of our coasts, far beyond the reach of cannon shot, as cruising ground for belligerent purposes." (Commentaries on American Law, 14th ed., p. 26.)

There had been a considerable body of opinion in favor of a general acceptance of a 6-mile limit before the World War. Since that time there has been a drift toward acceptance of a 3-mile limit as a minimum but recognizing that there were many claims to wider jurisdiction. The United States Government has usually maintained the 3-mile limit in recent years, though expressed willingness to consider a wider zone.

It now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays, and other inclosed arms of the sea along its coast, and a marginal belt of the sea extending from the coast line outward a marine league, or 3 geographic miles. (*Cunard S.S. Co.* v. *Mellon* (1923), 262 U.S. 100.)

The 3-mile limit was also embodied in the provisions of the numerous treaties which the United States negotiated from early 1924 in regard to the smuggling of intoxicating liquors.

Maritime jurisdiction; customs.—On June 13, 1929, the schooner *Dorothy M. Smart* when 11½ miles off the coast of Nova Scotia was seized by a customs officer. The case was appealed and finally came to the Judicial Committee of the Privy Council which gave judgment, July 28, 1932. In this judgment it was said,

The validity of the seizure, which was effected in pursuance of powers conferred by the Customs Act of Canada, Revised Statutes of Canada, 1927, c. 42, as amended by 18 and 19 Geo. V., c. 16, is challenged in the present proceedings on the broad ground that the Parliament of the Dominion in conferring the powers in question exceeded its legislative competence.

The enactments impugned are contained in sections 151 and 207 of the statute as amended.

Section 151 provides as follows:

"(1) If any vessel is hovering in territorial waters of Canada any officer may go on board such vessel and examine her cargo and may also examine the master or person in command upon oath touching the cargo and voyage and bring the vessel into port. . . .

"(7) For the purposes of this section and section two hundred and seven of this Act 'Territorial waters of Canada' shall mean the waters forming part of the territory of the Dominion of Canada and the waters adjacent to the Dominion within three marine miles thereof in case of any vessel and within twelve marine miles thereof in the case of any vessel registered in Canada."

Section 207 enacts as follows:

"(1) If upon the examination of any officer of the cargo of any vessel hovering in territorial waters of Canada any dutiable goods or any goods the importation of which into Canada is prohibited are found on board such vessel with her . . . cargo shall be seized and forfeited. . . ."

The question accordingly is whether it was within the power of the Dominion Parliament to pass such legislation purporting to operate to a distance of 12 miles from the coast of Canada. To test this question the respondent as plaintiff below initiated proceedings in the Supreme Court of Nova Scotia against the customs officer who had seized his vessel and cargo, claiming their return and damages for their detention on the ground of the illegality of the seizure. The trial Judge upheld the validity of the legislation and consequently of the seizure, and his decision was affirmed by five Judges of the Supreme Court of Nova Scotia *in banco*. On an appeal being taken to the Supreme Court of Canada this judgment was reversed by a majority consisting of Mr. Justice Duff, Mr. Justice Rinfret, and Mr. Justice Lamont—Mr. Justice Newcombe and Mr. Justice Cannon dissenting. The matter now comes before their Lordships on the defendant's appeal.

It may be accepted as a general principle that States can legislate effectively only for their own territories. To what distance seaward the territory of a State is to be taken as extending is a question of international law upon which their Lordships do not deem it necessary or proper to pronounce. But whatever be the limits of territorial waters in the international sense, it has long been recognized that for certain purposes, notably those of police, revenue, public health and fisheries, a State may

enact laws affecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of its territory. * * *

In the present case, however, there is no question of international law involved, for legislation of the kind here challenged is recognized as legitimate by international law, and in any event the provision impugned has no application to foreign vessels. The sole question is whether the Imperial Parliament, in conferring upon Canada, as it admittedly has done, full power to enact customs legislation, bestowed or withheld the power to enact the provisions now challenged. No question of any infraction of international law arises. * * *

So familiar indeed are such provisions in the history of British customs legislation that the series of measures embodying them have come to be known compendiously as the "Hovering Acts." Although these Acts have now all been repealed, the Customs Consolidation Act of 1876, by section 179, authorized the forfeiture of any ship belonging wholly or in part to British subjects, or having half the persons on board subjects of her Majesty, if found with prohibited goods on board within three leagues of the coast of the United Kingdom. In the case of other vessels not British the limit is fixed at one league from the Coast. (*Croft* v. *Dunphy*, July 28, 1932.)

Straits.—The word "strait" has sometimes been used to describe an estuary separating two land areas and open to the high sea only at one end. The strait here under consideration is between an island and coasts of states C and D and is a waterway navigable and open to the sea at both ends. The bodies of water sometimes called straits and opening to the sea at one end only have usually been subjected to a greater degree of control by the adjacent state or states than have straits connecting seas. The demarcation of the limits of jurisdiction may be in the competence of the adjacent states and the nature of the exercise of the jurisdiction may be similarly determined.

An example of this latter type is found in the treaty of February 28/16, 1825, between Great Britain and Russia in articles II and III.

II. In order to prevent the Right of navigating and fishing exercised upon the Ocean by the Subjects of The High Contracting Parties, from becoming the pretex for an illicit Commerce,

it is agreed that the Subjects of His Britannick Majesty shall not land at any place where there may be a Russian Establishment, without the permission of the Governor or Commandant; and, on the other hand, that Russian Subjects shall not land, without permission, at any British Establishment on the North-West Coast.

III. The line of demarcation between the Possessions of the High Contracting Parties, upon the Coast of the Continent, and the Islands of America to the North-West, shall be drawn in the manner following:—

Commencing from the Southernmost Point of the Island called *Prince of Wales Island*, which Point lies in the parallel of 54 degrees 40 minutes North latitude, and between the 131st and 133d degree of West longitude (Meridian of Greenwich), the said line shall ascend to the North along the Channel called *Portland Channel*, as far as the Point of the Continent where it strikes the 56th degree of North latitude; from this last-mentioned Point, the line of demarcation shall follow the summit of the mountains situated parallel to the Coast, as far as the point of intersection of the 141st degree of West longitude (of the same Meridian); and, finally, from the said Meridian Line of the 141st degree, in its prolongation as far as the Frozen Ocean, shall form the limit between the Russian and British Possessions on the Continent of America to the North-West. (12 British and Foreign State Papers, p. 38.)

This treaty subsequently became of importance to the United States as successor to Russia in this region.

Another boundary involving a strip of water running inland between two states was on the northwest frontier of the United States and in the treaty of June 15, 1846, it was stated,

Article 1. From the point on the 49th parallel of north latitude, where the boundary laid down in existing treaties and conventions between the United States and Great Britain terminates, the line of boundary between the territories of the United States and those of her Britannic Majesty shall be continued westward along the said 49th parallel of north latitude to the middle of the channel which separates the continent from Vancouver's Island, and thence southerly through the middle of the said channel, and of Fuca's Straits, to the Pacific Ocean;—*Provided, however*, That the navigation of the whole of the said channel and straits, south of the 49th parallel of north latitude,

shall remain free and open to both parties. (9 U.S. Stat. p. 869.)

The Fuca's Straits here mentioned at the entrance near Bonilla Point are somewhat more than 10 miles wide and at points within much wider, but a boundary covering these waters was accepted by the United States and Great Britain in 1873 in accord with an arbitral award of the German Emperor.

Jurisdiction over straits.—During the latter half of the nineteenth century there was a considerable drift toward widening the generally accepted area of jurisdiction of the sea. This tendency would also extend to jurisdiction over straits. After much discussion the Institute of International Law at its sessions in 1891, 1892, and 1894, gave attention to the question of definition and status of the territorial sea and in 1894 adopted the following:

ARTICLE 10. The provisions of the preceding articles apply to straits whose breadth does not exceed twelve miles, subject to the following modifications and distinctions:

1. Straits whose shores belong to different States form part of the territorial sea of the littoral States, which will exercise their sovereignty to the middle line.

2. Straits whose shores belong to the same State and which are indispensable to maritime communication between two or more States other than the littoral State always form part of the territorial sea of such State, whatever the distance between the coasts.

3. Straits which serve as a passage from one open sea to another open sea can never be closed.

ARTICLE 11. The *régime* of straits actually governed by special conventions or usages remains reserved. (Resolutions of the Institute of International Law, Carnegie Endowment for International Peace, p. 115.)

As the 6-mile limit for jurisdiction over the territorial sea was not generally accepted, the tendency has been to accept the principles of article 10 with the substitution of 6 in place of 12 miles.

Black Sea Straits.—Since late in the eighteenth century the passage from the Mediterranean to the Black

Sea has become an international question of capital importance. During the years when the whole coast line of the Black Sea and its entrances was under the jurisdiction of Turkey, there was little discussion of international rights. When Russia by treaty in 1774 obtained rights of passage through the Dardanelles and Bosphorus for Russian vessels of commerce, new problems arose and the "Straits question" as it came to be called became a European problem. During the Napoleonic Wars the passage of vessels of war gave rise to controversy and during the nineteenth century the degree of control of the Straits varied with the national relations. The United States did not formally admit the right to close these waters. Questions arose in regard to the passage of the Russian volunteer fleet vessels, particularly the *Smolensk* and *Peterburg*, during the Russo-Japanese War, 1904–05. (1906 Naval War College, International Law Topics, p. 119; 1907 Naval War College, International Law Situations, pp. 48–50; 1912 Ibid., p. 171.) Other problems arose when the *Breslau* and *Goeben*, German cruisers, sought refuge from the allied forces by entering the Straits.

In the Treaty of Sèvres, August 10, 1921, between the Principal Allied Powers and Turkey, provisions were made in section II of part III for navigation and control of the straits. Article 37 stated that,

> The navigation of the Straits, including the Dardanelles, the Sea of Marmora and the Bosphorus, shall in future be open, both in peace and war, to every vessel of commerce or of war and to military and commercial aircraft, without distinction of flag.
>
> These waters shall not be subject to blockade, nor shall any belligerent right be exercised nor any act of hostility be committed within them, unless in pursuance of a decision of the Council of the League of Nations.

Article 38 and following articles delegated control to a "commission of the straits" and outlined the method of control. This Treaty of Sèvres gave to Greece a

measure of control of the European shore of the Dardanelles and in this and other respects was unacceptable to Turkey and after further negotiations, Turkey taking advantage of the troubles of the Allied Powers, was able to make more favorable terms at the Lausanne Conference in 1923. In the Convention relating to the Régime of the Straits signed at Lausanne, July 24, 1923, Turkey obtained modification of many of the detailed restrictions of the unratified Treaty of Sèvres as well as control of the European coast of the Dardanelles, though "The principle of freedom of transit and of navigation by sea and by air, in time of peace as in time of war, in the Strait of the Dardanelles, the Sea of Marmora and the Bosphorus" is recognized in article 23 of the treaty which the convention elaborates.

Straits of Magellan.—Spain from 1520 held authority over the southern portion of South America and jurisdiction over the Straits of Magellan. Spain attempted to fortify the strait and for a time to close it to navigation. The establishing of the independence of the Argentine Republic and of Chile introduced new problems relating to the jurisdiction and navigation of these straits.

Since the last quarter of the nineteenth century the right of states adjacent to the Straits of Magellan to close that strait has ordinarily been denied. The Straits of Magellan afford a much more convenient and safer route for vessels passing from the southern Atlantic to the southern Pacific Ocean than the route by open sea. These straits for about 300 miles furnish an inland waterway from 2 to more than 10 miles in width. Part of this waterway is wholly within the jurisdictional area claimed by Chile and part is between Chile and the Argentine Republic. There has been much controversy between the two states over their respective territorial limits.

By the treaty between the Argentine Republic and Chile signed July 23, 1881, it was provided—

ARTICLE 5. The Strait of Magellan is neutralized, and free navigation thereon insured to the flags of all nations. With a view

to guaranteeing this freedom and neutrality, no fortification or military defenses will be raised that may clash with that object. (72 British and Foreign State Papers, p. 1103.)

Decrees of Chile, 1914.—The status of Chilean territorial waters and the Straits of Magellan so far as Chile was concerned was defined in two decrees in 1914.

No. 1857.

MINISTRY OF FOREIGN RELATIONS,
SANTIAGO, *November 5, 1914.*

Considering that, although it is true that the laws of the Republic have determined the limits of the territorial sea and of the national domain, and the distance to which extend the rights of police in all matters concerning the security of the country and the observance of customs laws, they have not fixed the maritime zone in reference to the safeguarding of the rights and the accomplishment of the duties relative to the neutrality declared by the Government in case of international conflicts; and that it is proper for sovereign states to fix this zone.

It is decreed:

The contiguous sea, up to a distance of 3 marine miles counted from the low-water line is considered as the jurisdictional or neutral sea on the coasts of the Republic for the safeguarding of the rights and the accomplishment of the duties relative to the neutrality declared by the Government in case of international conflicts.

Let it be noted, communicated, published, and inserted in the Bulletin of the Laws and Decrees of the Government.

BARROS LUCO.
MANUEL SALINAS.

(1916 Naval War College, International Law Topics, p. 19.)

No. 1986.

Considering that the Strait of Magellan as well as the canals of the southern region lie within the international limits of Chile, and consequently form part of the territory of the Republic,

It is decreed:

In reference to the neutrality established in the decree No. 1857 of November 5 last of the ministry of foreign affairs, the interior waters of the Strait of Magellan and the canals of the southern region, even in the parts which are distant more than 3 miles from either bank, should be considered as forming part of the jurisdictional or neutral sea.

Let it be noted, communicated, published, and inserted in the Bulletin of the Laws and Decrees of the Government.

BARROS LUCO.
MANUEL SALINAS.

(Ibid, p. 21.)

League of Nations Committee and straits.—On September 22, 1924, the Assembly of the League of Nations requested the Council to convene a committee of experts to consult and report to the Council upon what questions were sufficiently ripe for consideration with view to a progressive codification of international law. Among subjects regarded as fitted for an international conference was territorial waters. This committee of experts adopted a plan for a questionnaire to be submitted to the various states with the purpose of determining what should be the course of their labors. From this questionnaire matters relating to private international law, the law of war and of neutrality were in general excluded. In the report of the subcommittee—Messrs. Schücking, de Magalhaes, and Wickersham—having to do with territorial waters, Mr. Schücking's first draft provided in article 6:

The régime of straits at present subject to special conventions is reserved.

In Straits of which both shores belong to the same State, the sea shall be territorial, even if the distance between the shores exceeds 12 miles, provided that that distance is not exceeded at either entrance to the strait.

Straits not exceeding 12 miles in width whose shores belong to different States shall form part of the territorial sea as far as the middle line. (20 Amer. Journ. International Law, Supplement [1926], p. 117.)

This was not approved by the subcommittee. In commenting on this rule, Dr. Schücking remarked:

The legal view most generally favoured fixes as the limit the middle of the strait.

A rule of law not without practical importance which has been established as regards rights in straits serving as a passage to open seas is that such a strait may never be closed. This rule

is in accordance with the idea that a riparian State is not entitled in time of war completely to close its territorial sea. (Ibid., p. 89.)

Mr. Wickersham in referring to Dr. Schücking's attitude on straits said,

If the strait be more than six miles in width and the land on either side is owned by a different State, the general rule is that the boundary line runs through the middle of the stream. If, on the other hand, the stream be less than six miles in width, the principle of thalweg would ordinarily apply, although the rule is not uniform (see Hall, pp. 195–6; Lawrence, 140; Crocker, 281). If the shores of a strait on both sides are owned by one nation but the strait connects waters the opposite banks of which are owned by different Powers, the strait constitutes a maritime highway which may not be closed by the proprietor State (Rayneval, *Institutions du Droit de la Nature*, I, p. 298), e.g. the Baltic, the Dardanelles. (Ibid., p. 140.)

The draft convention as amended by Dr. Schücking in consequence of discussion by the committee of experts contained the following article in regard to straits:

Article 6. The régime of straits at present subject to special conventions is reserved. In straits of which both shores belong to the same State, the sea shall be territorial, even if the distance between the shores exceeds ten miles, provided that that distance is not exceeded at either entrance to the strait.

Straits not exceeding ten miles in width whose shores belong to different States shall form part of the territorial sea as far as the middle line. (Ibid., p. 142.)

Comments on proposed article 6.—In the preliminary replies there was a wide diversity of opinion among states upon the amended article 6 of the League of Nations Committee which proposed a 10-mile limit for straits.

Germany commented to the following effect:

Ad Article 6.—If the three-nautical-mile zone is taken as a basis, the legal status of straits should depend solely on whether their width at the entrance is over or under six nautical miles, as the case may be. (League of Nations. C. 196. M. 70. 1927. V. p. 131.)

International Law Association, 1926.—The International Law Association which had considered the ques-

tion and prepared a draft convention on the law of maritime jurisdiction in time of peace embodied in this convention in 1926 the following articles:

IV. Straits and Natural Channels Connecting Two Seas

ARTICLE 14

In the case of straits and natural channels which connect two or more seas and which divide two or more States, the limit of the territorial jurisdiction of each State shall be the middle line of the strait or channel which divides them, when the strait or channel is six miles or less in width.

ARTICLE 15

Where a strait or channel is more than six miles in width, the right of territorial jurisdiction of the littoral States extends to three miles from their respective coasts; beyond this limit its status is the same as on the high sea.

ARTICLE 16

When the power to make transit regulations is not vested in an international body, the regulations enacted by the littoral States shall, as far as possible, be uniform and such as not to interfere with freedom of navigation. (Report, 34th Conference, 1926, p. 101.)

Japanese Branch of the International Law Association.—The Japanese Branch of the International Law Association in 1926 accepted as the limit of the marginal sea the 3-mile line from the low-water mark and the 10-mile line for mouths of bays wholly bounded by one State. The draft prepared by the Japanese branch also had an article relating to straits as follows:

Article 3. If, in the case of straits the coasts of which belong to the same State, the distance between the shores of each entrance does not exceed ten marine miles, the littoral waters extend outwards at right angles from the straight lines respectively drawn across each entrance of the straits at the first points nearest the open sea where the width does not exceed ten marine miles.

In the case of straits the coasts of which belong to two or more different States, the littoral waters follow the trend of the coasts according to the general rule; but in case the distance between

the two shores does not amount to six marine miles, the dividing line between the respective littoral waters shall in principle be the middle line measured from the two coasts. (25 Revue de Droit International et Diplomatie [Tokio], July, 1926.)

Closure of ports.—Certain aspects of the closure of ports were considered in the Naval War College International Law Situations, 1930, under situation II. It was shown that ports were for various reasons closed for periods in time of peace and by effective blockade in time of war.

In May 1910, instructions had been issued in regard to interference with shipping off the coast of Nicaragua:

"'The Secretary of State then held that if the announced blockade or investment was effectively maintained, and the requirements of international law, including warning to approaching vessels, were observed, the United States Government would not be disposed to prevent its enforcement, but reserved all rights in respect to the validity of any proceedings against vessels as prizes of war. In the present instance it should, however, be observed that a vessel which, by deceiving the authorities at a port of the United States, sailed therefrom in the guise of a merchantman, but had in reality been destined for use as a war vessel, by such act has forfeited full belligerent rights, such as the right of search on the high seas and of blockade.' Also the letter of the Secretary of State to the Secretary of the Navy as of June 3, regarding a proposed instruction to Commander Gilmer, which instruction was also given: 'This Government denies the right of either faction to seize American-owned vessels or property without consent of and recompense to the owners. In such cases, if you can ascertain ownership, you will instantly act in accordance with this policy.' And the letter from the Secretary of the Navy to the Secretary of State of June 7, containing the notifications issued by Commander Gilmer under date of June 3: 'I received a communication to-day from Gen. Rivas, commanding Madriz forces, Bluefields Bluff, stating that certain vessels have been used by Estrada forces and that he would not permit vessels of Bluefield Steamship Co., Atlantic Navigation Co., Bellanger Co., and Cukra Co., all American companies, to pass through the waters held by Madriz forces. I informed him that Estrada had the right to use these vessels with consent of owners if properly remunerated, but while so used Rivas had

the right to capture or destroy them; but when in the company's legitimate trade I would permit no interference with them. I have ordered guard American marines or sailors on vessels passing Bluff when in legitimate trade. Have informed Rivas that if they were fired upon I would return the fire and would seize the *Venus* and *San Jacinto*, and that I would permit no interference with shipping of American firms in legitimate business.' " (1910 U.S. Foreign Relations, p. 756.)

It has been admitted that a state may act for its own defense by closing its ports in whole or in part.

Closure of straits.—There may be a difference of opinion as to closing a strait which is a highway for commerce. If a strait is the sole highway for commerce between two open seas, it has been generally maintained since the middle of the nineteenth century that it may not be closed as this would constitute a denial of the freedom of the sea. This position does not necessarily deny to a state adjacent to the strait the right to take within its own jurisdiction measures essential to a reasonable degree of protection for itself. These measures should, however, be restricted both in time and in character to action that would constitute the minimum degree of interference with innocent passage.

The Declaration of France and Great Britain, April 8, 1904, respecting Egypt and Morocco in article VII provides for the free passage of the Straits of Gibraltar as follows:

In order to secure the free passage of the Straits of Gibraltar, the erection of any fortifications or strategic works on that portion of the coast of Morocco comprised between, but not including, Melilla and the heights which command the right bank of the River Sebon.

This condition does not, however, apply to the places at present in the occupation of Spain on the Moorish coast of the Mediterranean. (32 Martens, Traités Générales, Noveau Recueille, 2d ser., 1905, pp. 15, 20.)

Declaration of war.—From early Biblical times there was usually a considerable degree of formality in instituting war measures. Formal announcements and re-

plies were common. The Greeks and Romans made declarations and at times prescribed a period between declaration and active hostilities during which satisfaction might be made. The sending of heralds, the issuing of ultimata, periods of grace, challenges, etc., in varying forms continued to be used till the late seventeenth century.

With extension of overseas territories and the development of maritime activity, practice became less strict and embargoes, letters of marque and reprisal indicated changed attitudes. During the eighteenth and nineteenth centuries the greater number of wars were carried on and concluded without declaration. Many complications and uncertainties arose in consequence of this change and the statement of the Court in the case of the *Buena Ventura* set forth the situation as of 1899:

> The practice of a formal proclamation before recognizing an existing war and capturing enemy's property has fallen into disuse in modern times, and actual hostilities may determine the date of the commencement of war, though no proclamation may have been issued, no declaration made, and no action of the legislative branch of the government had. (87 Fed. 927; 175 U.S. 384.)

The uncertainty of the time at which war commenced gave rise to many difficulties as the relations of belligerents and of neutrals changed. Intricate legal problems arose as to rights of capture, transfer of titles, and other relations common in modern relations among states and among their citizens. Accusations of treachery and many forms of misconduct had arisen in recent years because of resort to war without previous declaration.

In 1906 the Institute of International Law had after full discussion adopted the following resolutions:

> 1. It is in accordance with the requirements of international law, and with the spirit of fairness which nations owe to one another in their mutual relations, as well as in the common interest of all States, that hostilities must not commence without previous and explicit warning.

2. This warning may take place either under the form of a declaration of war pure and simple, or under that of an ultimatum, duly notified to the adversary by the State about to commence war.

3. Hostilities shall not commence before the expiration of a delay sufficient to make it certain that the rule of previous and explicit notice cannot be considered as evaded. (Scott, Resolutions of the Institute of International Law, p. 164.)

At the Second Hague Peace Conference, 1907, a somewhat more satisfactory form was adopted which gave a sanction to the requirement of a declaration by exempting neutrals from liability unless the state of war should be made known. Hague Convention III relative to the Commencement of Hostilities took the following form:

ARTICLE 1. The contracting powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.

This convention was generally ratified.

Reasons for declaring war.—The first article of Hague Convention III, Commencement of Hostilities, had provided for a declaration with reasons and reasons were given in the more than 50 declarations issued in the World War. These reasons included acts of aggression, cooperation with enemy, alliance with enemy, violation of treaties, subversive intrigues, violation of neutral rights, common cause with democratic nations, fulfillment of national aspirations, defense of navigation of the seas, and many others both concrete and abstract.

Brazilian rules, 1933.—Subsequent to the submission of this situation for consideration at the Naval War College, the Paraguayan Republic on May 10, 1933, declared a state of war with Bolivia. Argentina, May 13, 1933; Brazil, May 23, 1933; Chile, May 13, 1933; Peru, May 13, 1933; and Uruguay, May 12, 1933, declared neutrality. Brazil has usually issued detailed rules in regard to neutrality. Owing to the geographical situation of Bolivia and Paraguay as states with no seacoast but with river connections to the sea through neutral states, questions as

to communication and trade became important. Brazil aimed to maintain its neutrality by specific articles in its rules of neutrality such as—

ARTICLE 3. The agents of the Federal Government or of the States of Brazil are forbidden to export or to favor directly or indirectly the remittance of war material to either of the belligerents.

ARTICLE 4. The provision of the preceding article does not prevent the free transit, river or land, assured by treaties in effect between Brazil and either of the belligerents.

ARTICLE 5. It is forbidden to the belligerents to make on the land, river, or maritime territory of the United States of Brazil, a base of war operations or to practice acts which may constitute a violation of Brazilian neutrality.

Opening of hostilities.—The representatives of the states assembled at the Second Peace Conference at The Hague in 1907 in Conventions II and III distinguished between "recourse to armed force" [recours à la force armée] and "hostilities" [les hostilités]. In Convention II the powers state their desire to avoid "armed conflicts of a pecuniary origin", while the preamble of Convention III states that the Contracting Powers

Considering that it is important, in order to ensure the maintenance of pacific relations, that hostilities should not commence without previous warning;

That it is equally important that the existence of a state of war should be notified without delay to neutral Powers;

have agreed upon the following articles.

Before 1907 some writers had maintained that there was some sort of "political morality" which should be observed by states obliging them to make it publicly known before engaging in war. There was, however, before 1907 no legal obligation to make a declaration before engaging in hostilities and the legality of war without declaration was admitted in practice and by the courts. Evidence of the confusion which such a position may entail may be seen in the early stages of the Russo-Japanese war, 1904, as well as the Spanish-America war,

1898. With these facts in mind, the delegates at The Hague in 1907 hoped to and did, take a step toward peace by defining the conditions essential to the legal opening of hostilities.

The experience of states of the world since 1907 would seem to be sufficient to prove the legal value of a convention which would fix the time of and prerequisites for the opening of hostilities. The demarcation of the line between the use of force in time of peace and the hostile use of force in time of war should not be left uncertain. Frequently the use of force in time of peace has brought about conditions that have made war unnecessary. Without the demarcation of a line between peace and war, uncertainty as to the rights of the parties using force as well as of third parties prevails. Other conventions of the Hague Conference of 1907 rest upon the Convention Relating to the Opening of Hostilities. The discussions at the Hague in 1907 give ample evidence of the distinction between the idea of the resort to the use of force and the resort to war. The parties signing and ratifying the Hague Convention acted with clear understanding upon this matter and much of the recent confusion is due to writing and discussion that fails to make the legally established distinction which has prevailed since 1907. Some of these writers have based their conclusions upon eighteenth and nineteenth century practice and decisions from some of the unfortunate consequences of which the efforts of 1907 aimed to escape. Others have argued in a fashion implying that the Covenant of the League of Nations superseded all existing treaties and established a new vocabulary for international law and new principles for interpretation of treaties. Such methods discredit their conclusions and weaken confidence in the Covenant of the League. The Hague Convention of 1907, not drawn up at a time of exceptional international stress, aimed to take steps toward the maintenance of peace in the world on the basis

of respect for law, and no state or states were under compulsion to affix their signatures or to accept the conventions. The method of procedure in relation to the opening of hostilities may in brief summary show this.

Making Hague Convention III, 1907.—Before drawing up the Convention Relative to the Opening of Hostilities at The Hague, 1907, a questionnaire was prepared by the President of the subcommission to which the topic was committed for presentation. This questionnaire was as follows:

1. Is it desirable to establish an international understanding relative to the opening of hostilities?

(On the supposition of an affirmative response to this question:)

2. Is it best to require that the opening of hostilities be preceded by a declaration of war or an equivalent act?

3. Is it best to fix upon a time which must elapse between the notification of such an act and the opening of hostilities?

4. Should it be stipulated that the declaration of war or equivalent act to be notified to neutrals?

And by whom?

5. What should be the consequences of a failure to observe the preceding rules?

6. What is the diplomatic form in which it is best to set out the understanding? (III Proceedings of the Hague Peace Conference, Carnegie Endowment translation, p. 253.)

The first question was answered by a unanimous affirmative. There was, however, discussion as to whether there should be a requirement of a definite period between the declaration and the first act of hostilities. The Institute of International Law at its meeting in 1906 had been unable to agree that there should be a specified interval between the declaration and the act of hostilities. Since the state of war affects not merely the relations between the belligerents but also between belligerents and neutrals, it was pointed out in the discussions that this change should be made known to neutrals and in order that this might be done, the Convention provided in article 2 that:

The state of war must be notified to the neutral powers without delay, and shall not take effect in regard to them until after the receipt of a notification, which may even be given by telegraph. Neutral powers, nevertheless, can not plead the absence of notification if it is established beyond doubt that they were in fact aware of the state of war.

Both in the preamble and in the articles of this Hague Convention III, the distinction between hostilities and a state of war is recognized. There might be a state of war without any hostilities or conflict of the armed public forces. The neutral rights and obligations arose from a known state of war regardless of whether any hostilities had or had not taken place.

Many of the other conventions drawn up at The Hague in 1907 presuppose the existence of a requirement making a declaration of war necessary, e.g., to determine days of grace, to determine right to convert merchant vessels into vessels of war, etc.

Radio in time of peace.—The use of radio in time of peace has been regulated by successive conferences during the twentieth century. Each conference has had new problems before it as the use and possibilities of use of radio have been extended. Several of the most recent conferences have been mainly concerned with details often of a highly technical character. Regulations for standardized wave lengths, etc., have been found essential for effectivity of radio communication. It has been clearly recognized that international cooperation is essential and at the same time the greatest possible national freedom is desirable. This is evident in the work of the conferences of Berlin (1906), and London (1912), Washington (1927), and Madrid (1932). In the time of peace the use of radio which is not in contravention to the agreements under the international conventions is wholly a matter of control of the authority within whose jurisdiction the station may be and under the convention states parties to the terms undertake to enforce provisions of the articles. No control of stations outside na-

tional jurisdiction is conferred though agreements are made as to their operation. A station upon a merchant vessel on the high sea in time of peace would, therefore, be under the jurisdiction of the flag which the vessel lawfully flies. When a vessel flying the flag of one state is within the territorial waters of another state, it is generally accepted that for acts which take effect outside the vessel the state within whose waters a vessel is may regulate the action of the vessel.

Radio in war.—The regulation of radio in time of war has received consideration at the Naval War College from time to time since 1907. (See General Index, 1901–30.) The conclusion from these discussions and from the practice in the World War may be summarized in article 2 of the Report of the Committee of Jurists:

> Belligerent and neutral Powers may regulate or prohibit the operation of radio stations within their jurisdiction. (1924 Naval War College, International Law Documents, p. 100.)

Mine laying.—The use of mines has long been a subject of differing opinion. Many regarded mines as embodying an unseen menace which should be prohibited, but as in the case of torpedoes and other modern means of warfare such objections have received relatively little attention other than to lead to the formulating of rules against mine laying involving unnecessary risk to noncombatants and neutrals. The use of mines during the Russo-Japanese war 1904–05 brought the matter to the attention of states just before the Hague Peace Conference of 1907, and that conference drafted a convention upon the subject of submarine mines. This convention provided:

> ARTICLE 1.
>
> It is forbidden:
>
> 1. To lay unanchored automatic contact mines, except when they are so constructed as to become harmless one hour at most after those who laid them cease to control them;
>
> 2. To lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings;

3. To use torpedoes which do not become harmless when they have missed their mark.

ARTICLE 2.

It is forbidden to lay automatic contact mines off the coast and ports of the enemy, with the sole object of intercepting commercial shipping.

ARTICLE 3.

When anchored automatic contact mines are employed, every possible precaution must be taken for the security of peaceful shipping.

The belligerents undertake to do their utmost to render these mines harmless within a limited time, and, should they cease to be under surveillance, to notify the danger zones soon as military exigencies permit, by a notice addressed to shipowners, which must also be communicated to the Governments through the diplomatic channel.

ARTICLE 4.

Neutral powers which lay automatic contact mines off its coasts must observe the same rules and take the same precautions as are imposed on belligerents.

The neutral Power must inform ship-owners, by a notice issued in advance, where automatic contact mines have been laid. This notice must be communicated at once to the Governments through the diplomatic channel. (36 U.S. Statutes, pp. 2332, 2343.)

A somewhat extended discussion of these and other articles of Hague Convention VIII relative to the laying of automatic contact submarine mines may be found in topic IV, pp. 100–138, of Naval War College, International Law Topics and Discussions, 1914.

Mines in World War.—Mines had been found useful in the Russo-Japanese and other wars and were used early in the World War. The American Ambassador at Berlin telegraphed to the Secretary of State on August 7, 1914:

The Foreign Office has the honor to inform the Embassy of the United States of America that during the state of war in which the German Empire now finds itself, the necessity will arise, according to prospects, of blockading with mines the points of departure for attacks on the part of hostile fleets against

Germany, and the ports of shipment, departing and arriving, of troop transport.

The Foreign Office begs the United States Embassy to bring this to the knowledge of its Government as soon as possible in order that shipping may be warned in due time against entering harbors and roadsteads which may serve as bases for the hostile forces. (1914 U.S. Foreign Relations, Supplement, p. 454, note 2.)

The Secretary of State on August 10 asked the American Ambassador in Great Britain if there was any foundation for the report that belligerents were scattering contact mines in the Channel. On the following day a reply was received,

The naval attaché is assured by Admiralty officials that Admiralty have not laid and will not lay mines in navigable waters except at entrance of ports they wish to defend. Sir Edward Grey tells me that Germany has been laying contact mines in the North Sea. The German mine-laying ship *Königen Luise*, recently destroyed by H.M.S. *Amphion*, was engaged in laying a line of contact mines to extend across the North Sea. (Ibid, p. 455.)

On the same day the British Chargé in Washington presented to the Secretary of State a copy of a telegram he had received the evening before from the Foreign Office, as follows:

The Germans are scattering contact mines indiscriminately about the North Sea in the open sea without regard to the consequences to merchantmen. Two days ago four large merchant ships were observed to pass within a mile of the mine field which sank H.M.S. *Amphion*. The waters of the North Sea must therefore be regarded as perilous in the last degree to merchant shipping of all nations. In view of the methods adopted by Germany the British Admiralty must hold themselves fully at liberty to adopt similar measures in self-defense which must inevitably increase the dangers to navigation in the North Sea. But, before doing so, they think it right to issue this warning in order that merchant ships under neutral flags trading with North Sea ports should be turned back before entering the area of such exceptional danger. (Ibid.)

While taking note of this communication and calling attention to the obligations under article 1 of VIII Hague Convention, 1907, the reply of August 13, said:

The Secretary of State is loath to believe that a signatory to that convention would wilfully disregard its treaty obligation, which was manifestly made in the interest of neutral shipping.

All restrictions upon the rights of neutrals upon the high seas, the common highway of nations, during the progress of a war, are permitted in the interests of the belligerents, who are bound in return to prevent their hostile operations from increasing the hazard of neutral ships in the open sea so far as the exigencies of the war permit.

If an enemy of His Majesty's Government has, as asserted, endangered neutral commerce by an act in violation of the Hague convention, which can not be justified on the ground of military necessity, the Secretary of State perceives no reason for His Majesty's Government adopting a similar course, which would add further dangers to the peaceful navigation of the high seas by vessels of neutral powers.

The Secretary of State, therefore, expresses the earnest and confident hope that His Majesty's Government may not feel compelled to resort, as a defensive measure, to a method of naval warfare, which would appear to be contrary to the terms of the Hague convention and impose upon the ships and lives of neutrals a needless menace when peaceably navigating the high seas. (Ibid, p. 456.)

On August 19 another communication from the British Chargé threw down the argument for neutral obligation which was later often brought forward by the belligerents,

His Majesty's Government share the reluctance of the Secretary of State to see the practice extended and the danger to neutral shipping increased. At the same time His Majesty's Chargé d'Affairs is instructed to point out that if Great Britain refrains from adopting the methods of Germany, the result is that Germany receives immunity unless the neutral powers can find some means of making Germany feel that she cannot continue to preserve all facilities for receiving trade and supplies through neutral shipping while impeding British commerce by means the use of which by Great Britain is deprecated by the United States Government. (Ibid, p. 458.)

On August 23 a communication further announced,

The Admiralty wish to draw attention to their previous warning to neutrals of the danger of traversing the North Sea. The Germans are continuing their practice of laying mines indis-

criminately upon the ordinary trade routes. These mines do not conform to the conditions of the Hague convention; they do not become harmless after a certain number of hours; they are not laid in connection with any definite military scheme such as the closing of a military port or as a distinct operation against a fighting fleet, but appear to be scattered on the chance of catching individual British war or merchant vessels. In consequence of this policy neutral ships, no matter what their destination, are exposed to the gravest dangers. Two Danish vessels, the S.S. *Maryland* and the S.S. *Broberg*, have within the last twenty-four hours been destroyed by these deadly engines in the North Sea while traveling on the ordinary trade routes at a considerable distance from the British coast. In addition to this, it is reported that two Dutch steamers clearing from Swedish ports were yesterday blown up by German mines in the Baltic. In these circumstances the Admiralty desire to impress not only on British but on neutral shipping the vital importance of touching at British ports before entering the North Sea, in order to ascertain according to the latest information the routes and channels which the Admiralty are keeping swept and along which these dangers to neutrals and merchantmen are reduced as far as possible. The Admiralty, while reserving to themselves the utmost liberty of retaliatory action against this new form of warfare, announce that they have not so far laid any mines during the present war and that they are endeavouring to keep the sea routes open for peaceful commerce. (Ibid, p. 458.)

The German Ambassador in a communication to the American Secretary of State dated September 10, 1914, said,

Mr. Secretary of State: By direction of my Government, I have the honor respectfully to bring the following to your excellency's knowledge:

No foundation for idea prevalent among neutrals abroad that sea trade with Germany is tied up by blockade of German ports. No port is blockaded and nothing stands in the way of neutral states' sea trade with Germany.

Assertions from England that North Sea is infested with German mines incorrect.

Neutral vessels bound for German North Sea ports should steer by day for a point 10 nautical miles northwest of Helgoland. There German pilots will be provided to bring ships into port.

Neutral vessels should steer direct for Baltic Sea ports, off every one of which there are pilots.

Prohibition of coal export not extended to bunker coal, and coaling assured. (Ibid, p. 460.)

On October 6 the French Government issued a notice asserting that Austria-Hungary was illegally laying mines in the Adriatic and that the French Navy would lay mines in conformity with stipulations of Convention VIII.

Soon protests, notes, counter notes, denials, etc., came from nearly all foreign offices and there followed what one reply characterized as a "volume of strong words and moral indignation." These communications came from both belligerents each affirming that its opponent was in the wrong, but generally admitting that the laying of mines for defense under the terms of Convention VIII was lawful.

Proposals of the United States, 1915.—The declaration by Germany of the war zone about Great Britain and the controversies over the use of mines led the United States on February 20, 1915, to propose to Germany and Great Britain the basis of an agreement.

Germany and Great Britain to agree:

(1) That neither will sow any floating mines, whether upon the high sea or in territorial waters; that neither will plant on the high seas anchored mines except within cannon range of harbors for defensive purposes only; and that all mines shall bear the stamp of the government planting them and be so constructed as to become harmless if separated from their moorings;

(2) That neither will use submarines to attack merchant vessels of any nationality except to enforce the right of visit and search;

(3) That each will require their respective merchant vessels not to use neutral flags for the purpose of disguise or *ruse de guerre.* (1915 U.S. Foreign Relations, Supplement, p. 119.)

To this proposition the German Government replied, February 28:

With regard to the various points of the American note they beg to make the following remarks:

1. With regard to the sowing of mines, the German Government would be willing to agree as suggested not to use floating mines

and to have anchored mines constructed as indicated. Moreover, they agree to put the stamp of the Government on all mines to be planted. On the other hand, it does not appear to them to be feasible for the belligerents wholly to forego the use of anchored mines for offensive purposes.

2. The German Government would undertake not to use their submarines to attack mercantile of any flag except when necessary to enforce the right of visit and search. Should the enemy nationality of the vessel or the presence of contraband be ascertained submarine would proceed in accordance with the general rules of international law. (Ibid. p. 130.)

Great Britain did not reply till March 15 and then said:

On the 22d of February last I received a communication from your excellency of the identic note addressed to His Majesty's Government and to Germany respecting an agreement on certain points as to the conduct of the war at sea. The reply of the German Government to his note has been published and it is not understood from the reply that the German Government are prepared to abandon the practice of sinking British merchant vessels by submarines, and it is evident from their reply that they will not abandon the use of mines for offensive purposes on the high seas as contrasted with the use of mines for defensive purposes only within cannon range of their own harbours as suggested by the Government of the United States. This being so, it might appear unnecessary for the British Government to make any further reply than to take note of the German answer. We desire, however, to take the opportunity of making a fuller statement of the whole position and of our feeling with regard to it. (Ibid, p. 140.)

There followed in the somewhat long note a statement in regard to the German conduct of the war and of the grounds which Great Britain considered as justifying its action on various matters.

Summary of the attitude of the United States.—The Counselor for the Department of State, Frank L. Polk, sent to Representative John J. Fitzgerald, a memorandum upon the attitude taken by the Department of State in way of protest against action of belligerents considered in violation of the principles of international law.

The summary of the attitude toward the use of mines up to August 18, 1916, was stated as follows:

The illegal use of mines in the present war has not been confined to any one belligerent. Both sides have violated the rights of neutrals and have sown large areas of the high seas with mines, the result of which has been the destruction of a number of neutral vessels.

On August 7, 1914, the German Government notified all neutral countries that the trade routes to English ports would be closed by mines.

In a note dated August 11, 1914, the British Ambassador alleged that Germany had scattered contact mines indiscriminately about the North Sea, and informed this Government that in view of this fact the British Admiralty would adopt similar methods in self-defense.

On August 13 the Secretary of State protested against such action on the part of Great Britain, stating that even "if an enemy of His Majesty's Government has, as asserted, endangered neutral commerce by an act in violation of the Hague convention, which cannot be justified on the ground of military necessity," this country saw no reason for Great Britain adopting a similar course which would add further to the dangers to peaceful navigation of the high seas by vessels of neutral powers.

On November 3, 1914, Great Britain, alleging that during the past week the German Government had scattered mines indiscriminately in the open seas and on main trade routes from America to Liverpool via the north of Ireland, that peaceful merchant ships have already been blown up, and that the mines were laid by some merchant vessels flying neutral flags, declared the North Sea a military area, and that all ships that did not follow an indicated course would be in grave danger from the mines it had been necessary to lay.

On February 4, 1915, Germany in retaliation for various alleged illegal acts on the part of Great Britain, notified neutral nations that "the waters surrounding Great Britain and Ireland, including the whole English Channel, are hereby declared a war zone." It was indicated at the same time that they would ignore the rule of international law requiring visit and search and would sink merchantmen without first ascertaining whether they were neutral or enemy ships and without making provisions for the safety of passengers and crew.

To this proclamation the United States on February 10, 1915, protested, and pointed out that such action on the part of Germany would endanger the lives and property of citizens of neu-

tral and friendly nations, and would violate the principles of international law. In its note the United States stated that:

"The Government of the United States has not consented to or acquiesced in any measures which may have been taken by the other belligerent nations in the present war which operate to restrain neutral trade, but has, on the contrary, taken in all such matters a position which warrants it in holding those governments responsible in the proper way for any unlawful effects upon American shipping which the accepted principles of international law do not justify, and that it therefore regards itself as free in the present instance to take, with a clear conscience and upon accepted principles, the position indicated in this note."

On February 20, 1915, the United States in the interest of neutral commerce sent identic notes to Germany and Great Britain in which the hope was expressed that these two belligerents "may through reciprocal concessions, find a basis for agreement which will relieve neutral ships engaged in peaceful commerce from the great dangers which they will incur on the high seas adjacent to the coasts of the belligerents," and outlined a course of action with regard to the sowing of mines and the importation of foodstuffs into Germany, to which it was hoped they would agree. Unfortunately it was not possible to secure the consent of the two Governments to the proposal. (1916 U.S. Foreign Relations, Supplement, p. 5.)

Résumé.—While strained relations may cause a state to exercise such measures as it may deem expedient within the laws of peace, such relations do not permit the exercise of the rights of war toward third states. The Pact of Paris of August 27, 1928, declares against war, but not against resort to peaceful measures for settling differences between states. A strait which is the sole highway communication between two open seas, as the Strait of Gibraltar, may not be closed in peace or war, while a strait which forms a more convenient or more commonly used highway to which there is a reasonable alternative way may be subject to such restrictive measures upon its use as the adjacent states may deem essential for self-defense. The use of radio is generally prescribed by international conventions to which the leading states of the world are parties. The conventions do not give to a state jurisdiction outside territorial limits over vessels not flying its flag though in time of war

rules may be more extended and action necessary for self-defense may be taken in the immediate area of belligerent operations. In recent years, since 1907, most states have by convention or in practice not resorted to war without previous declaration many of which in the World War contained detailed reasons and specific indication of the time when the status of war would exist. After such declaration the use of submarine mines under enumerated restrictions is permitted by the Convention of 1907.

SOLUTION

1. *In time of peace.*—(*a*) States C and D have no exceptional rights of jurisdiction over a strait along their coasts connecting generally used water areas, though states C and D may take action necessary for self-defense.

(*b*) Vessels of other states have the right of innocent passage through the strait but they are subject to reasonable regulations while within the territorial waters of C or D.

(*c*) The *Bara* as a merchant vessel of state B is entirely exempt from the jurisdiction of state C while on the high sea, but must conform to the regulations of state C and D when within the jurisdiction of those states.

2. *In time of war.*—(*a*) States C and D have a right to regulate the use of their territorial waters and the waters within the immediate area of their operations.

(*b*) Vessels of neutral states have the right of innocent passage through the strait though they are subject to reasonable regulations while within the territorial waters of C or D. In view of the fact that the strait is not the sole but the more convenient and commonly used waterway, the rights of C or D may, as an extreme measure, extend to closing of the strait.

(*c*) After the declaration of war, the *Bara*, as a merchant vessel of state B, is under obligation to observe the regulations of state C or D when within the territorial jurisdiction or the immediate area of the operation of their forces.

Appendixes

Appendix I. Convention to frame constitution for Philippine Islands. January 17, 1933

Appendix II. Convention to frame constitution for Philippine Islands. March 24, 1934

109

APPENDIX I

[PUBLIC—No. 311—72D CONGRESS] [1]

[H.R. 7233]

AN ACT

To enable the people of the Philippine Islands to adopt a constitution and form a government for the Philippine Islands, to provide for the independence of the same, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

CONVENTION TO FRAME CONSTITUTION FOR PHILIPPINE ISLANDS

SECTION 1. The Philippine Legislature is hereby authorized to provide for the election of delegates to a constitutional convention, which shall meet in the hall of the house of representatives in the capital of the Philippine Islands, at such time as the Philippine Legislature may fix, within one year after the enactment of this Act, to formulate and draft a constitution for the government of the Commonwealth of the Philippine Islands, subject to the conditions and qualifications prescribed in this Act, which shall exercise jurisdiction over all the territory ceded to the United States by the treaty of peace concluded between the United States and Spain on the 10th day of December, 1898, the boundaries of which are set forth in Article III of said treaty, together with those islands embraced in the treaty between Spain and the United States concluded at Washington on the 7th day of November, 1900. The Philippine Legislature shall provide for the necessary expenses of such convention.

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[1] This act was rejected by the Philippine Legislature by a resolution of October 17, 1933.

CHARACTER OF CONSTITUTION—MANDATORY PROVISIONS

SEC. 2. The constitution formulated and drafted shall be republican in form, shall contain a bill of rights, and shall, either as a part thereof or in an ordinance appended thereto, contain provisions to the effect that, pending the final and complete withdrawal of the sovereignty of the United States over the Philippine Islands—

(a) All citizens of the Philippine Islands shall owe allegiance to the United States.

(b) Every officer of the government of the Commonwealth of the Philippine Islands shall, before entering upon the discharge of his duties, take and subscribe an oath of office, declaring, among other things, that he recognizes and accepts the supreme authority of and will maintain true faith and allegiance to the United States.

(c) Absolute toleration of religious sentiment shall be secured and no inhabitant or religious organization shall be molested in person or property on account of religious belief or mode of worship.

(d) Property owned by the United States, cemeteries, churches, and parsonages or convents appurtenant thereto, and all lands, buildings, and improvements used exclusively for religious, charitable, or educational purposes shall be exempt from taxation.

(e) Trade relations between the Philippine Islands and the United States shall be upon the basis prescribed in section 6.

(f) The public debt of the Philippine Islands and its subordinate branches shall not exceed limits now or hereafter fixed by the Congress of the United States; and no loans shall be contracted in foreign countries without the approval of the President of the United States.

(g) The debts, liabilities, and obligations of the present Philippine government, its Provinces, municipalities, and instrumentalities, valid and subsisting at the time of the adoption of the constitution, shall be assumed and paid by the new government.

(h) Provision shall be made for the establishment and maintenance of an adequate system of public schools, primarily conducted in the English language.

(i) Acts affecting currency, coinage, imports, exports, and immigration shall not become law until approved by the President of the United States.

(j) Foreign affairs shall be under the direct supervision and control of the United States.

(k) All acts passed by the legislature of the Commonwealth of the Philippine Islands shall be reported to the Congress of the United States.

(l) The Philippine Islands recognizes the right of the United States to expropriate property for public uses, to maintain military and other reservations and armed forces in the Philippines, and, upon order of the President, to call into the service of such armed forces all military forces organized by the Philippine government.

(m) The decisions of the courts of the Commonwealth of the Philippine Islands shall be subject to review by the Supreme Court of the United States as provided in paragraph (6) of section 7.

(n) The United States may by Presidential proclamation exercise the right to intervene for the preservation of the government of the Commonwealth of the Philippine Islands and for the maintenance of the government as provided in the constitution thereof, and for the protection of life, property, and individual liberty and for the discharge of government obligations under and in accordance with the provisions of the constitution.

(o) The authority of the United States High Commissioner to the government of the Commonwealth of the Philippine Islands, as provided in this Act, shall be recognized.

(p) Citizens and corporations of the United States shall enjoy in the Commonwealth of the Philippine Islands all the civil rights of the citizens and corporations, respectively, thereof.

SUBMISSION OF CONSTITUTION TO THE PRESIDENT OF THE UNITED STATES

SEC. 3. Upon the drafting and approval of the constitution by the constitutional convention in the Philippine Islands, the constitution shall be submitted within two years after the enactment of this Act to the President of the United States, who shall determine whether or not it conforms with the provisions of this Act. If the President finds that the proposed constitution conforms substantially with the provisions of this Act he shall so

certify to the Governor General of the Philippine Islands, who shall so advise the constitutional convention. If the President finds that the constitution does not conform with the provisions of this Act he shall so advise the Governor General of the Philippine Islands, stating wherein in his judgment the constitution does not so conform and submitting provisions which will in his judgment make the constitution so conform. The Governor General shall in turn submit such message to the constitutional convention for further action by them pursuant to the same procedure hereinbefore defined, until the President and the constitutional convention are in agreement.

SUBMISSION OF CONSTITUTION TO FILIPINO PEOPLE

SEC. 4. After the President of the United States has certified that the constitution conforms with the provisions of this Act, it shall be submitted to the people of the Philippine Islands for their ratification or rejection at an election to be held within four months after the date of such certification, on a date to be fixed by the Philippine Legislature, at which election the qualified voters of the Philippine Islands shall have an opportunity to vote directly for or against the proposed constitution and ordinances appended thereto. Such election shall be held in such manner as may be prescribed by the Philippine Legislature, to which the return of the election shall be made. The Philippine Legislature shall by law provide for the canvassing of the return and shall certify the result to the Governor General of the Philippine Islands, together with a statement of the votes cast, and a copy of said constitution and ordinances. If a majority of the votes cast shall be for the constitution, such vote shall be deemed an expression of the will of the people of the Philippine Islands in favor of Philippine independence, and the Governor General shall, within thirty days after receipt of the certification from the Philippine Legislature, issue a proclamation for the election of officers of the government of the Commonwealth of the Philippine Islands provided for in the constitution. The election shall take place not earlier than three months nor later than six months after the proclamation by the Governor General ordering such election. When

the election of the officers provided for under the constitution has been held and the results determined, the Governor General of the Philippine Islands shall certify the results of the election to the President of the United States, who shall thereupon issue a proclamation announcing the results of the election, and upon the issuance of such proclamation by the President the existing Philippine government shall terminate and the new government shall enter upon its rights, privileges, powers, and duties, as provided under the constitution. The present government of the Philippine Islands shall provide for the orderly transfer of the functions of government.

If a majority of the votes cast are against the constitution, the existing government of the Philippine Islands shall continue without regard to the provisions of this Act.

TRANSFER OF PROPERTY AND RIGHTS TO PHILIPPINE COMMONWEALTH

SEC. 5. All the property and rights which may have been acquired in the Philippine Islands by the United States under the treaties mentioned in the first section of this Act, except such land or other property as has heretofore been designated by the President of the United States for military and other reservations of the Government of the United States, and except such land or other property or rights or interests therein as may have been sold or otherwise disposed of in accordance with law, are hereby granted to the government of the Commonwealth of the Philippine Islands when constituted.

RELATIONS WITH THE UNITED STATES PENDING COMPLETE INDEPENDENCE

SEC. 6. After the date of the inauguration of the government of the Commonwealth of the Philippine Islands trade relations between the United States and the Philippine Islands shall be as now provided by law, subject to the following exceptions:

(a) There shall be levied, collected, and paid on all refined sugars in excess of fifty thousand long tons, and on unrefined sugars in excess of eight hundred thousand

long tons, coming into the United States from the Philippine Islands in any calendar year, the same rates of duty which are required by the laws of the United States to be levied, collected, and paid upon like articles imported from foreign countries.

(b) There shall be levied, collected, and paid on all coconut oil coming into the United States from the Philippine Islands in any calendar year in excess of two hundred thousand long tons, the same rates of duty which are required by the laws of the United States to be levied, collected, and paid upon like articles imported from foreign countries.

(c) There shall be levied, collected, and paid on all yarn, twine, cord, cordage, rope and cable, tarred or untarred, wholly or in chief value of manila (abaca) or other hard fibers, coming into the United States from the Philippine Islands in any calendar year in excess of a collective total of three million pounds of all such articles hereinbefore enumerated, the same rates of duty which are required by the laws of the United States to be levied, collected, and paid upon like articles imported from foreign countries.

(d) In the event that in any year the limit in the case of any article which may be exported to the United States free of duty shall be reached by the Philippine Islands, the amount or quantity of such articles produced or manufactured in the Philippine Islands thereafter that may be so exported to the United States free of duty shall be allocated, under export permits issued by the government of the Commonwealth of the Philippine Islands, to the producers or manufacturers of such articles proportionately on the basis of their exportation to the United States in the preceding year; except that in the case of unrefined sugar the amount thereof to be exported annually to the United States free of duty shall be allocated to the sugar-producing mills of the islands proportionately on the basis of their average annual production for the calendar years 1931, 1932, and 1933, and the amount of sugar from each mill which may be so exported shall be allocated in each year between the mill and the planters on the basis of the proportion of sugar to which the mill and the planters are respectively entitled. The government of the Philippine Islands is authorized to adopt the necessary laws and regulations for putting into effect the allocation hereinbefore provided.

(e) The government of the Commonwealth of the Philippine Islands shall impose and collect an export tax on all articles that may be exported to the United States from the Philippine Islands free of duty under the provisions of existing law as modified by the foregoing provisions of this section, including the articles enumerated in subdivisions (a), (b), and (c), within the limitations therein specified, as follows:

(1) During the sixth year after the inauguration of the new government the export tax shall be 5 per centum of the rates of duty which are required by the laws of the United States to be levied, collected, and paid on like articles imported from foreign countries;

(2) During the seventh year after the inauguration of the new government the export tax shall be 10 per centum of the rates of duty which are required by the laws of the United States to be levied, collected, and paid on like articles imported from foreign countries;

(3) During the eighth year after the inauguration of the new government the export tax shall be 15 per centum of the rates of duty which are required by the laws of the United States to be levied, collected, and paid on like articles imported from foreign countries;

(4) During the ninth year after the inauguration of the new government the export tax shall be 20 per centum of the rates of duty which are required by the laws of the United States to be levied, collected, and paid on like articles imported from foreign countries;

(5) After the expiration of the ninth year after the inauguration of the new government the export tax shall be 25 per centum of the rates of duty which are required by the laws of the United States to be levied, collected, and paid on like articles imported from foreign countries.

The government of the Commonwealth of the Philippine Islands shall place all funds received from such export taxes in a sinking fund, and such fund shall, in addition to other moneys available for that purpose, be applied solely to the payment of the principal and interest on the bonded indebtedness of the Philippine Islands, its Provinces, municipalities, and instrumentalities, until such indebtedness has been fully discharged.

When used in this section in a geographical sense, the term "United States" includes all Territories and possessions of the United States, except the Philippine Is-

lands, the Virgin Islands, American Samoa, and the island of Guam.

SEC. 7. Until the final and complete withdrawal of American sovereignty over the Philippine Islands—

(1) Every duly adopted amendment to the constitution of the government of the Commonwealth of the Philippine Islands shall be submitted to the President of the United States for approval. If the President approves the amendment or if the President fails to disapprove such amendment within six months from the time of its submission, the amendment shall take effect as a part of such constitution.

(2) The President of the United States shall have authority to suspend the taking effect of or the operation of any law, contract, or executive order of the government of the Commonwealth of the Philippine Islands, which in his judgment will result in a failure of the government of the Commonwealth of the Philippine Islands to fulfill its contracts, or to meet its bonded indebtedneses and interest thereon or to provide for its sinking funds, or which seems likely to impair the reserves for the protection of the currency of the Philippine Islands, or which in his judgment will violate international obligations of the United States.

(3) The Chief Executive of the Commonwealth of the Philippine Islands shall make an annual report to the President and Congress of the United States of the proceedings and operations of the government of the Commonwealth of the Philippine Islands and shall make such other reports as the President or Congress may request.

(4) The President shall appoint, by and with the advice and consent of the Senate, a United States High Commissioner to the government of the Commonwealth of the Philippine Islands who shall hold office at the pleasure of the President and until his successor is appointed and qualified. He shall be known as the United States High Commissioner to the Philippine Islands. He shall be the representative of the President of the United States in the Philippine Islands and shall be recognized as such by the government of the Commonwealth of the Philippine Islands, by the commanding officers of the military forces of the United States, and by all civil officials of the United States in the Philippine Islands. He shall have access to all records of the

government or any subdivision thereof, and shall be furnished by the Chief Executive of the Commonwealth of the Philippine Islands with such information as he shall request.

If the government of the Commonwealth of the Philippine Islands fails to pay any of its bonded or other indebtedness or the interest thereon when due or to fulfill any of its contracts, the United States High Commissioner shall immediately report the facts to the President, who may thereupon direct the High Commissioner to take over the customs offices and administration of the same, administer the same, and apply such part of the revenue received therefrom as may be necessary for the payment of such overdue indebtedness or for the fulfillment of such contracts. The United States High Commissioner shall annually, and at such other times as the President may require, render an official report to the President and Congress of the United States. He shall perform such additional duties and functions as may be delegated to him from time to time by the President under the provisions of this Act.

The United States High Commissioner shall receive the same compensation as is now received by the Governor General of the Philippine Islands, and shall have such staff and assistants as the President may deem advisable and as may be appropriated for by Congress, including a financial expert, who shall receive for submission to the High Commissioner a duplicate copy of the reports of the insular auditor. Appeals from decisions of the insular auditor may be taken to the President of the United States. The salaries and expenses of the High Commissioner and his staff and assistants shall be paid by the United States.

The first United States High Commissioner appointed under this Act shall take office upon the inauguration of the new government of the Commonwealth of the Philippine Islands.

(5) The government of the Commonwealth of the Philippine Islands shall provide for the selection of a Resident Commissioner to the United States, and shall fix his term of office. He shall be the representative of the government of the Commonwealth of the Philippine Islands and shall be entitled to official recognition as such by all departments upon presentation to the President of credentials signed by the Chief Executive of said

government. He shall have a seat in the House of Representatives of the United States, with the right of debate, but without the right of voting. His salary and expenses shall be fixed and paid by the government of the Philippine Islands. Until a Resident Commissioner is selected and qualified under this section, existing law governing the appointment of Resident Commissioners from the Philippine Islands shall continue in effect.

(6) Review by the Supreme Court of the United States of cases from the Philippine Islands shall be as now provided by law; and such review shall also extend to all cases involving the constitution of the Commonwealth of the Philippine Islands.

SEC. 8. (*a*) Effective upon the acceptance of this Act by concurrent resolution of the Philippine Legislature or by a convention called for that purpose, as provided in section 17—

(1) For the purposes of the Immigration Act of 1917, the Immigration Act of 1924 (except section 13 (c)), this section, and all other laws of the United States relating to the immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens. For such purposes the Philippine Islands shall be considered as a separate country and shall have for each fiscal year a quota of fifty. This paragraph shall not apply to a person coming or seeking to come to the Territory of Hawaii who does not apply for and secure an immigration or passport visa, but such immigration shall be determined by the Department of the Interior on the basis of the needs of industries in the Territory of Hawaii.

(2) Citizens of the Philippine Islands who are not citizens of the United States shall not be admitted to the Continental United States from the Territory of Hawaii (whether entering such Territory before or after the effective date of this section) unless they belong to a class declared to be nonimmigrants by section 3 of the Immigration Act of 1924 or to a class declared to be nonquota immigrants under the provisions of section 4 of such Act other than subdivision (c) thereof, or unless they were admitted to such Territory under an immigration visa. The Secretary of Labor shall by regulations provide a method for such exclusion and for the admission of such excepted classes.

(3) Any Foreign Service officer may be assigned to duty in the Philippine Islands, under a commission as a consular officer, for such period as may be necessary and under such regulations as the Secretary of State may prescribe, during which assignment such officer shall be considered as stationed in a foreign country; but his powers and duties shall be confined to the performance of such of the official acts and notarial and other services, which such officer might properly perform in respect of the administration of the immigration laws if assigned to a foreign country as a consular officer, as may be authorized by the Secretary of State.

(4) For the purposes of sections 18 and 20 of the Immigration Act of 1917, as amended, the Philippine Islands shall be considered to be a foreign country.

(b) The provisions of this section are in addition to the provisions of the immigration laws now in force, and shall be enforced as a part of such laws, and all the penal or other provisions of such laws, not inapplicable, shall apply to and be enforced in connection with the provisions of this section. An alien, although admissible under the provisions of this section, shall not be admitted to the United States if he is excluded by any provision of the immigration laws other than this section, and an alien, although admissible under the provisions of the immigration laws other than this section, shall not be admitted to the United States if he is excluded by any provision of this section.

(c) Terms defined in the Immigration Act of 1924 shall, when used in this section, have the meaning assigned to such terms in that Act.

SEC. 9. There shall be no obligation on the part of the United States to meet the interest or principal of bonds and other obligations of the government of the Philippine Islands or of the Provincial and municipal governments thereof, hereafter issued during the continuance of United States sovereignty in the Philippine Islands: *Provided*, That such bonds and obligations hereafter issued shall not be exempt from taxation in the United States or by authority of the United States.

RECOGNITION OF PHILIPPINE INDEPENDENCE AND WITHDRAWAL OF AMERICAN SOVEREIGNTY

SEC. 10. On the 4th day of July, immediately following the expiration of a period of ten years from the date

of the inauguration of the new government under the constitution provided for in this Act, the President of the United States shall by proclamation withdraw and surrender all right of possession, supervision, jurisdiction, control, or sovereignty then existing and exercised by the United States in and over the territory and people of the Philippine Islands, including all military and other reservations of the Government of the United States in the Philippines (except such land or property reserved under section 5 as may be redesignated by the President of the United States not later than two years after the date of such proclamation), and, on behalf of the United States, shall recognize the independence of the Philippine Islands as a separate and self-governing nation and acknowledge the authority and control over the same of the government instituted by the people thereof, under the constitution then in force: *Provided*, That the constitution has been previously amended to include the following provisions:

(1) That the property rights of the United States and the Philippine Islands shall be promptly adjusted and settled, and that all existing property rights of citizens or corporations of the United States shall be acknowledged, respected, and safeguarded to the same extent as property rights of citizens of the Philippine Islands.

(2) That the officials elected and serving under the constitution adopted pursuant to the provisions of this Act shall be constitutional officers of the free and independent government of the Philippine Islands and qualified to function in all respects as if elected directly under such government, and shall serve their full terms of office as prescribed in the constitution.

(3) That the debts and liabilities of the Philippine Islands, its Provinces, cities, municipalities, and instrumentalities, which shall be valid and subsisting at the time of the final and complete withdrawal of the sovereignty of the United States, shall be assumed by the free and independent government of the Philippine Islands; and that where bonds have been issued under authority of an Act of Congress of the United States by the Philippine Islands, or any Province, city, or municipality therein, the Philippine government will make adequate provision for the necessary funds for the payment of interest and principal, and such obligations shall be

a first lien on the taxes collected in the Philippine Islands.

(4) That the government of the Philippine Islands, on becoming independent of the United States, will assume all continuing obligations assumed by the United States under the treaty of peace with Spain ceding said Philippine Islands to the United States.

(5) That by way of further assurance the government of the Philippine Islands will embody the foregoing provisions (except paragraph (2)) in a treaty with the United States.

NEUTRALIZATION OF PHILIPPINE ISLANDS

SEC. 11. The President is requested, at the earliest practicable date, to enter into negotiations with foreign powers with a view to the conclusion of a treaty for the perpetual neutralization of the Philippine Islands, if and when Philippine independence shall have been achieved.

NOTIFICATION TO FOREIGN GOVERNMENTS

SEC. 12. Upon the proclamation and recognition of the independence of the Philippine Islands, the President shall notify the governments with which the United States is in diplomatic correspondence thereof and invite said governments to recognize the independence of the Philippine Islands.

TARIFF DUTIES AFTER INDEPENDENCE

SEC. 13. After the Philippine Islands have become a free and independent nation there shall be levied, collected, and paid upon all articles coming into the United States from the Philippine Islands the rates of duty which are required to be levied, collected, and paid upon like articles imported from other foreign countries: *Provided*, That at least one year prior to the date fixed in this Act for the independence of the Philippine Islands, there shall be held a conference of representatives of the Government of the United States and the government of the Commonwealth of the Philippine Islands, such representatives to be appointed by the President of the United States and the Chief Executive

73500—34——9

of the Commonwealth of the Philippine Islands, respectively, for the purpose of formulating recommendations as to future trade relations between the Government of the United States and the independent government of the Philippine Islands, the time, place, and manner of holding such conference to be determined by the President of the United States; but nothing in this proviso shall be construed to modify or affect in any way any provision of this Act relating to the procedure leading up to Philippine independence or the date upon which the Philippine Islands shall become independent.

IMMIGRATION AFTER INDEPENDENCE

SEC. 14. Upon the final and complete withdrawal of American sovereignty over the Philippine Islands the immigration laws of the United States (including all the provisions thereof relating to persons ineligible to citizenship) shall apply to persons who were born in the Philippine Islands to the same extent as in the case of other foreign countries.

CERTAIN STATUTES CONTINUED IN FORCE

SEC. 15. Except as in this Act otherwise provided, the laws now or hereafter in force in the Philippine Islands shall continue in force in the Commonwealth of the Philippine Islands until altered, amended, or repealed by the Legislature of the Commonwealth of the Philippine Islands or by the Congress of the United States, and all references in such laws to the Philippines or Philippine Islands shall be construed to mean the government of the Commonwealth of the Philippine Islands. The government of the Commonwealth of the Philippine Islands shall be deemed successor to the present government of the Philippine Islands and of all the rights and obligations thereof. Except as otherwise provided in this Act, all laws or parts of laws relating to the present government of the Philippine Islands and its administration are hereby repealed as of the date of the inauguration of the government of the Commonwealth of the Philippine Islands.

SEC. 16. If any provision of this Act is declared unconstitutional or the applicability thereof to any person or circumstance is held invalid, the validity of the re-

mainder of the Act and the applicability of such provisions to other persons and circumstances shall not be affected thereby.

EFFECTIVE DATE

SEC. 17. The foregoing provisions of this Act shall not take effect until accepted by concurrent resolution of the Philippine Legislature or by a convention called for the purpose of passing upon that question as may be provided by the Philippine Legislature.

JNO N. GARNER
Speaker of the House of Representatives.

CHARLES CURTIS
Vice President of the United States and President of the Senate.

IN THE HOUSE OF REPRESENTATIVES
OF THE UNITED STATES,
January 13, 1933.

The House of Representatives having proceeded, in pursuance of the Constitution, to reconsider the bill (H. R. 7233) entitled "An act to enable the people of the Philippine Islands to adopt a constitution and form a government for the Philippine Islands, to provide for the independence of the same, and for other purposes," returned by the President of the United States, with his objections, to the House of Representatives, in which it originated, it was

Resolved, That the said bill pass, two-thirds of the House of Representatives agreeing to pass the same.

Attest:

SOUTH TRIMBLE
Clerk.

IN THE SENATE OF THE UNITED STATES
January 10 (calendar day, January 17), 1933.

The Senate having proceeded to reconsider the bill (H. R. 7233) entitled "An Act to enable the people of the Philippine Islands to adopt a constitution and form a government for the Philippine Islands, to provide for the independence of the same, and for other purposes,"

returned by the President of the United States to the House of Representatives, in which it originated, with his objections, and passed by the House on a reconsideration of the same, it was

RESOLVED, That the said bill pass, two-thirds of the Senators present having voted in the affirmative.

Attest:

EDWIN P. THAYER
Secretary.

APPENDIX II

[PUBLIC—No. 127—73D CONGRESS][1]

[H.R. 8573]

AN ACT

To provide for the complete independence of the Philippine Islands, to provide for the adoption of a constitution and a form of government for the Philippine Islands, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

CONVENTION TO FRAME CONSTITUTION FOR PHILIPPINE ISLANDS

SECTION 1. The Philippine Legislature is hereby authorized to provide for the election of delegates to a constitutional convention, which shall meet in the hall of the house of representatives in the capital of the Philippine Islands, at such time as the Philippine Legislature may fix, but not later than October 1, 1934, to formulate and draft a constitution for the government of the Commonwealth of the Philippine Islands, subject to the conditions and qualifications prescribed in this Act, which shall exercise jurisdiction over all the territory ceded to the United States by the treaty of peace concluded between the United States and Spain on the 10th day of December 1898, the boundaries of which are set forth in article III of said treaty, together with those islands embraced in the treaty between Spain and the United States concluded at Washington on the 7th day of November 1900. The Philippine Legislature shall provide for the necessary expenses of such convention.

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[1] This Act was accepted by the Philippine Legislature by a Concurrent Resolution of May 1, 1934.

CHARACTER OF CONSTITUTION—MANDATORY PROVISIONS

SEC. 2. (*a*) The constitution formulated and drafted shall be republican in form, shall contain a bill of rights, and shall, either as a part thereof or in an ordinance appended thereto, contain provisions to the effect that, pending the final and complete withdrawal of the sovereignty of the United States over the Philippine Islands—

(1) All citizens of the Philippine Islands shall owe allegiance to the United States.

(2) Every officer of the government of the Commonwealth of the Philippine Islands shall, before entering upon the discharge of his duties, take and subscribe an oath of office, declaring, among other things, that he recognizes and accepts the supreme authority of and will maintain true faith and allegiance to the United States.

(3) Absolute toleration of religious sentiment shall be secured and no inhabitant or religious organization shall be molested in person or property on account of religious belief or mode of worship.

(4) Property owned by the United States, cemeteries, churches, and parsonages or convents appurtenant thereto, and all lands, buildings, and improvements used exclusively for religious, charitable, or educational purposes shall be exempt from taxation.

(5) Trade relations between the Philippine Islands and the United States shall be upon the basis prescribed in section 6.

(6) The public debt of the Philippine Islands and its subordinate branches shall not exceed limits now or hereafter fixed by the Congress of the United States; and no loans shall be contracted in foreign countries without the approval of the President of the United States.

(7) The debts, liabilities, and obligations of the present Philippine government, its Provinces, municipalities, and instrumentalities, valid and subsisting at the time of the adoption of the constitution, shall be assumed and paid by the new government.

(8) Provision shall be made for the establishment and maintenance of an adequate system of public schools, primarily conducted in the English language.

(9) Acts affecting currency, coinage, imports, exports, and immigration shall not become law until approved by the President of the United States.

(10) Foreign affairs shall be under the direct supervision and control of the United States.

(11) All acts passed by the Legislature of the Commonwealth of the Philippine Islands shall be reported to the Congress of the United States.

(12) The Philippine Islands recognizes the right of the United States to expropriate property for public uses, to maintain military and other reservations and armed forces in the Philippines, and, upon order of the President, to call into the service of such armed forces all military forces organized by the Philippine government.

(13) The decisions of the courts of the Commonwealth of the Philippine Islands shall be subject to review by the Supreme Court of the United States as provided in paragraph (6) of section 7.

(14) The United States may, by Presidential proclamation, exercise the right to intervene for the preservation of the government of the Commonwealth of the Philippine Islands and for the maintenance of the government as provided in the constitution thereof, and for the protection of life, property, and individual liberty and for the discharge of government obligations under and in accordance with the provisions of the constitution.

(15) The authority of the United States High Commissioner to the government of the Commonwealth of the Philippine Islands, as provided in this Act, shall be recognized.

(16) Citizens and corporations of the United States shall enjoy in the Commonwealth of the Philippine Islands all the civil rights of the citizens and corporations, respectively, thereof.

(b) The constitution shall also contain the following provisions, effective as of the date of the proclamation of the President recognizing the independence of the Philippine Islands, as hereinafter provided:

(1) That the property rights of the United States and the Philippine Islands shall be promptly adjusted and settled, and that all existing property rights of citizens or corporations of the United States shall be acknowledged, respected, and safeguarded to the same extent as property rights of citizens of the Philippine Islands.

(2) That the officials elected and serving under the constitution adopted pursuant to the provisions of this Act shall be constitutional officers of the free and independent government of the Philippine Islands and qualified to function in all respects as if elected directly under such government, and shall serve their full terms of office as prescribed in the constitution.

(3) That the debts and liabilities of the Philippine Islands, its Provinces, cities, municipalities, and instrumentalities, which shall be valid and subsisting at the time of the final and complete withdrawal of the sovereignty of the United States, shall be assumed by the free and independent government of the Philippine Islands; and that where bonds have been issued under authority of an Act of Congress of the United States by the Philippine Islands, or any Province, city, or municipality therein, the Philippine government will make adequate provision for the necessary funds for the payment of interest and principal, and such obligations shall be a first lien on the taxes collected in the Philippine Islands.

(4) That the government of the Philippine Islands, on becoming independent of the United States, will assume all continuing obligations assumed by the United States under the treaty of peace with Spain ceding said Philippine Islands to the United States.

(5) That by way of further assurance the government of the Philippine Islands will embody the foregoing provisions (except paragraph (2)) in a treaty with the United States.

SUBMISSION OF CONSTITUTION TO THE PRESIDENT OF THE UNITED STATES

SEC. 3. Upon the drafting and approval of the constitution by the constitutional convention in the Philippine Islands, the constitution shall be submitted within two years after the enactment of this Act to the President of the United States, who shall determine whether or not it conforms with the provisions of this Act. If the President finds that the proposed constitution conforms substantially with the provisions of this Act he shall so certify to the Governor General of the Philippine Islands, who shall so advise the constitutional convention. If the President finds that the constitution does not conform with the provisions of this Act he shall so

advise the Governor General of the Philippine Islands, stating wherein in his judgment the constitution does not so conform and submitting provisions which will in his judgment make the constitution so conform. The Governor General shall in turn submit such message to the constitutional convention for further action by them pursuant to the same procedure hereinbefore defined, until the President and the constitutional convention are in agreement.

SUBMISSION OF CONSTITUTION TO FILIPINO PEOPLE

SEC. 4. After the President of the United States has certified that the constitution conforms with the provisions of this Act, it shall be submitted to the people of the Philippine Islands for their ratification or rejection at an election to be held within four months after the date of such certification, on a date to be fixed by the Philippine Legislature, at which election the qualified voters of the Philippine Islands shall have an opportunity to vote directly for or against the proposed constitution and ordinances appended thereto. Such election shall be held in such manner as may be prescribed by the Philippine Legislature, to which the return of the election shall be made. The Philippine Legislature shall by law provide for the canvassing of the return and shall certify the result to the Governor General of the Philippine Islands, together with a statement of the votes cast, and a copy of said constitution and ordinances. If a majority of the votes cast shall be for the constitution, such vote shall be deemed an expression of the will of the people of the Philippine Islands in favor of Philippine independence, and the Governor General shall, within thirty days after receipt of the certification from the Philippine Legislature, issue a proclamation for the election of officers of the government of the Commonwealth of the Philippine Islands provided for in the constitution. The election shall take place not earlier than three months nor later than six months after the proclamation by the Governor General ordering such election. When the election of the officers provided for under the constitution has been held and the results determined, the Governor General of the Philippine Islands shall certify the results of the election to the President of the United States, who shall thereupon issue

a proclamation announcing the results of the election, and upon the issuance of such proclamation by the President the existing Philippine government shall terminate and the new government shall enter upon its rights, privileges, powers, and duties, as provided under the constitution. The present government of the Philippine Islands shall provide for the orderly transfer of the functions of government.

If a majority of the votes cast are against the constitution, the existing government of the Philippine Islands shall continue without regard to the provisions of this Act.

TRANSFER OF PROPERTY AND RIGHTS TO PHILIPPINE COMMONWEALTH

SEC. 5. All the property and rights which may have been acquired in the Philippine Islands by the United States under the treaties mentioned in the first section of this Act, except such land or other property as has heretofore been designated by the President of the United States for Military and other reservations of the Government of the United States, and except such land or other property or rights or interest therein as may have been sold or otherwise disposed of in accordance with law, are hereby granted to the government of the Commonwealth of the Philippine Islands when constituted.

RELATIONS WITH THE UNITED STATES PENDING COMPLETE INDEPENDENCE

SEC. 6. After the date of the inauguration of the government of the Commonwealth of the Philippine Islands trade relations between the United States and the Philippine Islands shall be as now provided by law, subject to the following exceptions:

(a) There shall be levied, collected, and paid on all refined sugars in excess of fifty thousand long tons, and on unrefined sugars in excess of eight hundred thousand long tons, coming into the United States from the Philippine Islands in any calendar year, the same rates of duty which are required by the laws of the United States to be levied, collected, and paid upon like articles imported from foreign countries.

(b) There shall be levied, collected, and paid on all coconut oil coming into the United States from the Philippine Islands in any calendar year in excess of two hundred thousand long tons, the same rates of duty which are required by the laws of the United States to be levied, collected, and paid upon like articles imported from foreign countries.

(c) There shall be levied, collected, and paid on all yarn, twine, cord, cordage, rope and cable, tarred or untarred, wholly or in chief value of manila (abaca) or other hard fibers, coming into the United States from the Philippine Islands in any calendar year in excess of a collective total of three million pounds of all such articles hereinbefore enumerated, the same rates of duty which are required by the laws of the United States to be levied, collected, and paid upon like articles imported from foreign countries.

(d) In the event that in any year the limit in the case of any article which may be exported to the United States free of duty shall be reached by the Philippine Islands, the amount or quantity of such articles produced or manufactured in the Philippine Islands thereafter that may be so exported to the United States free of duty shall be allocated, under export permits issued by the government of the Commonwealth of the Philippine Islands, to the producers or manufacturers of such articles proportionately on the basis of their exportation to the United States in the preceding year; except that in the case of unrefined sugar the amount thereof to be exported annually to the United States free of duty shall be allocated to the sugar-producing mills of the islands proportionately on the basis of their average annual production for the calendar years 1931, 1932, and 1933, and the amount of sugar from each mill which may be so exported shall be allocated in each year between the mill and the planters on the basis of the proportion of sugar to which the mill and the planters are respectively entitled. The government of the Philippine Islands is authorized to adopt the necessary laws and regulations for putting into effect the allocation hereinbefore provided.

(e) The government of the Commonwealth of the Philippine Islands shall impose and collect an export tax on all articles that may be exported to the United States from the Philippine Islands free of duty under

the provisions of existing law as modified by the foregoing provisions of this section, including the articles enumerated in subdivisions (a), (b), and (c), within the limitations therein specified, as follows:

(1) During the sixth year after the inauguration of the new government the export tax shall be 10 per centum of the rates of duty which are required by the laws of the United States to be levied, collected, and paid on like articles imported from foreign countries;

(2) During the seventh year after the inauguration of the new government the export tax shall be 10 per centum of the rates of duty which are required by the laws of the United States to be levied, collected, and paid on like articles imported from foreign countries;

(3) During the eighth year after the inauguration of the new government the export tax shall be 15 per centum of the rates of duty which are required by the laws of the United States to be levied, collected, and paid on like articles imported from foreign countries;

(4) During the ninth year after the inauguration of the new government the export tax shall be 20 per centum of the rates of duty which are required by the laws of the United States to be levied, collected, and paid on like articles imported from foreign countries;

(5) After the expiration of the ninth year after the inauguration of the new government the export tax shall be 25 per centum of the rates of duty which are required by the laws of the United States to be levied, collected, and paid on like articles imported from foreign countries.

The government of the Commonwealth of the Philippine Islands shall place all funds received from such export taxes in a sinking fund, and such funds shall, in addition to other moneys available for that purpose, be applied solely to the payment of the principal and interest on the bonded indebtedness of the Philippine Islands, its Provinces, municipalities, and instrumentalities, until such indebtedness has been fully discharged.

When used in this section in a geographical sense, the term "United States" includes all Territories and possessions of the United States, except the Philippine Islands, the Virgin Islands, American Samoa, and the island of Guam.

SEC. 7. Until the final and complete withdrawal of American sovereignty over the Philippine Islands—

(1) Every duly adopted amendment to the constitution of the government of the Commonwealth of the Philippine Islands shall be submitted to the President of the United States for approval. If the President approves the amendment or if the President fails to disapprove such amendment within six months from the time of its submission, the amendment shall take effect as a part of such constitution.

(2) The President of the United States shall have authority to suspend the taking effect of or the operation of any law, contract, or executive order of the government of the Commonwealth of the Philippine Islands, which in his judgment will result in a failure of the government of the Commonwealth of the Philippine Islands to fulfill its contracts, or to meet its bonded indebtedness and interest thereon or to provide for its sinking funds, or which seems likely to impair the reserves for the protection of the currency of the Philippine Islands, or which in his judgment will violate international obligations of the United States.

(3) The Chief Executive of the Commonwealth of the Philippine Islands shall make an annual report to the President and Congress of the United States of the proceedings and operations of the government of the Commonwealth of the Philippine Islands and shall make such other reports as the President or Congress may request.

(4) The President shall appoint, by and with the advice and consent of the Senate, a United States High Commissioner to the government of the Commonwealth of the Philippine Islands who shall hold office at the pleasure of the President and until his successor is appointed and qualified. He shall be known as the United States High Commissioner to the Philippine Islands. He shall be the representative of the President of the United States in the Philippine Islands and shall be recognized as such by the government of the Commonwealth of the Philippine Islands, by the commanding officers of the military forces of the United States, and by all civil officials of the United States in the Philippine Islands. He shall have access to all records of the government or any subdivision thereof, and shall be furnished by the Chief Executive of the Commonwealth of the Philippine Islands with such information as he shall request.

If the government of the Commonwealth of the Philippine Islands fails to pay any of its bonded or other indebtedness or the interest thereon when due or to fulfill any of its contracts, the United States High Commissioner shall immediately report the facts to the President, who may thereupon direct the High Commissioner to take over the customs offices and administration of the same, administer the same, and apply such part of the revenue received therefrom as may be necessary for the payment of such overdue indebtedness or for the fulfillment of such contracts. The United States High Commissioner shall annually, and at such other times as the President may require, render an official report to the President and Congress of the United States. He shall perform such additional duties and functions as may be delegated to him from time to time by the President under the provisions of this Act.

The United States High Commissioner shall receive the same compensation as is now received by the Governor General of the Philippine Islands, and shall have such staff and assistants as the President may deem advisable and as may be appropriated for by Congress, including a financial expert, who shall receive for submission to the High Commissioner a duplicate copy of the reports of the insular auditor. Appeals from decisions of the insular auditor may be taken to the President of the United States. The salaries and expenses of the High Commissioner and his staff and assistants shall be paid by the United States.

The first United States High Commissioner appointed under this Act shall take office upon the inauguration of the new government of the Commonwealth of the Philippine Islands.

(5) The government of the Commonwealth of the Philippine Islands shall provide for the selection of a Resident Commissioner to the United States, and shall fix his term of office. He shall be the representative of the government of the Commonwealth of the Philippine Islands and shall be entitled to official recognition as such by all departments upon presentation to the President of credentials signed by the Chief Executive of said government. He shall have a seat in the House of Representatives of the United States, with the right of debate, but without the right of voting. His salary and expenses shall be fixed and paid by the government of

the Philippine Islands. Until a Resident Commissioner is selected and qualified under this section, existing law governing the appointment of Resident Commissioners from the Philippine Islands shall continue in effect.

(6) Review by the Supreme Court of the United States of cases from the Philippine Islands shall be as now provided by law; and such review shall also extend to all cases involving the constitution of the Commonwealth of the Philippine Islands.

SEC. 8. (a) Effective upon the acceptance of this Act by concurrent resolution of the Philippine Legislature or by a convention called for that purpose, as provided in section 17—

(1) For the purposes of the Immigration Act of 1917, the Immigration Act of 1924 (except section 13(c)), this section, and all other laws of the United States relating to the immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens. For such purposes the Philippine Islands shall be considered as a separate country and shall have for each fiscal year a quota of fifty. This paragraph shall not apply to a person coming or seeking to come to the Territory of Hawaii who does not apply for and secure an immigration or passport visa, but such immigration shall be determined by the Department of the Interior on the basis of the needs of industries in the Territory of Hawaii.

(2) Citizens of the Philippine Islands who are not citizens of the United States shall not be admitted to the continental United States from the Territory of Hawaii (whether entering such Territory before or after the effective date of this section) unless they belong to a class declared to be nonimmigrants by section 3 of the Immigration Act of 1924 or to a class declared to be nonquota immigrants under the provisions of section 4 of such Act other than subdivision (c) thereof, or unless they were admitted to such Territory under an immigration visa. The Secretary of Labor shall by regulations provide a method for such exclusion and for the admission of such excepted classes.

(3) Any Foreign Service officer may be assigned to duty in the Philippine Islands, under a commission as a consular officer, for such period as may be necessary and under such regulations as the Secretary of State may

prescribe, during which assignment such officer shall be considered as stationed in a foreign country; but his powers and duties shall be confined to the performance of such of the official acts and notarial and other services, which such officer might properly perform in respect of the administration of the immigration laws if assigned to a foreign country as a consular officer, as may be authorized by the Secretary of State.

(4) For the purposes of sections 18 and 20 of the Immigration Act of 1917, as amended, the Philippine Islands shall be considered to be a foreign country.

(b) The provisions of this section are in addition to the provisions of the immigration laws now in force, and shall be enforced as a part of such laws, and all the penal or other provisions of such laws not inapplicable, shall apply to and be enforced in connection with the provisions of this section. An alien, although admissible under the provisions of this section, shall not be admitted to the United States if he is excluded by any provision of the immigration laws other than this section, and an alien, although admissible under the provisions of the immigration laws other than this section, shall not be admitted to the United States if he is excluded by any provision of this section.

(c) Terms defined in the Immigration Act of 1924 shall, when used in this section, have the meaning assigned to such terms in that Act.

SEC. 9. There shall be no obligation on the part of the United States to meet the interest or principal of bonds and other obligations of the government of the Philippine Islands or of the Provincial and municipal governments thereof, hereafter issued during the continuance of United States sovereignty in the Philippine Islands: *Provided*, That such bonds and obligations hereafter issued shall not be exempt from taxation in the United States or by authority of the United States.

RECOGNITION OF PHILIPPINE INDEPENDENCE AND WITHDRAWAL OF AMERICAN SOVEREIGNTY

SEC. 10. (a) On the 4th day of July immediately following the expiration of a period of ten years from the date of the inauguration of the new government under the constitution provided for in this Act the President of the United States shall by proclamation withdraw and

surrender all right of possession, supervision, jurisdiction, control, or sovereignty then existing and exercised by the United States in and over the territory and people of the Philippine Islands, including all military and other reservations of the Government of the United States in the Philippines (except such naval reservations and fueling stations as are reserved under section 5), and, on behalf of the United States, shall recognize the independence of the Philippine Islands as a separate and self-governing nation and acknowledge the authority and control over the same of the government instituted by the people thereof, under the constitution then in force.

(b) The President of the United States is hereby authorized and empowered to enter into negotiations with the government of the Philippine Islands, not later than two years after his proclamation recognizing the independence of the Philippine Islands, for the adjustment and settlement of all questions relating to naval reservations and fueling stations of the United States in the Philippine Islands, and pending such adjustment and settlement the matter of naval reservations and fueling stations shall remain in its present status.

NEUTRALIZATION OF PHILIPPINE ISLANDS

SEC. 11. The President is requested, at the earliest practicable date, to enter into negotiations with foreign powers with a view to the conclusion of a treaty for the perpetual neutralization of the Philippine Islands, if and when Philippine independence shall have been achieved.

NOTIFICATION TO FOREIGN GOVERNMENTS

SEC. 12. Upon the proclamation and recognition of the independence of the Philippine Islands, the President shall notify the governments with which the United States is in diplomatic correspondence thereof and invite said governments to recognize the independence of the Philippine Islands.

TARIFF DUTIES AFTER INDEPENDENCE

SEC. 13. After the Philippine Islands have become a free and independent nation there shall be levied, col-

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lected, and paid upon all articles coming into the United States from the Philippine Islands the rates of duty which are required to be levied, collected, and paid upon like articles imported from other foreign countries: *Provided*, That at least one year prior to the date fixed in this Act for the independence of the Philippine Islands, there shall be held a conference of representatives of the Government of the United States and the government of the Commonwealth of the Philippine Islands, such representatives to be appointed by the President of the United States and the Chief Executive of the Commonwealth of the Philippine Islands, respectively, for the purpose of formulating recommendations as to future trade relations between the Government of the United States and the independent government of the Philippine Islands, the time, place, and manner of holding such conference to be determined by the President of the United States; but nothing in this proviso shall be construed to modify or affect in any way any provision of this Act relating to the procedure leading up to Philippine independence or the date upon which the Philippine Islands shall become independent.

IMMIGRATION AFTER INDEPENDENCE

SEC. 14. Upon the final and complete withdrawal of American sovereignty over the Philippine Islands the immigration laws of the United States (including all the provisions thereof relating to persons ineligible to citizenship) shall apply to persons who were born in the Philippine Islands to the same extent as in the case of other foreign countries.

CERTAIN STATUTES CONTINUED IN FORCE

SEC. 15. Except as in this Act otherwise provided, the laws now or hereafter in force in the Philippine Islands shall continue in force in the Commonwealth of the Philippine Islands until altered, amended, or repealed by the Legislature of the Commonwealth of the Philippine Islands or by the Congress of the United States, and all references in such laws to the government or officials of the Philippines or Philippine Islands shall be construed, insofar as applicable, to refer to the government and corresponding officials respectively of the Com-

monwealth of the Philippine Islands. The government of the Commonwealth of the Philippine Islands shall be deemed successor to the present government of the Philippine Islands and of all the rights and obligations thereof. Except as otherwise provided in this Act, all laws or parts of laws relating to the present government of the Philippine Islands and its administration are hereby repealed as of the date of the inauguration of the government of the Commonwealth of the Philippine Islands.

SEC. 16. If any provision of this Act is declared unconstitutional or the applicability thereof to any person or circumstance is held invalid, the validity of the remainder of the Act and the applicability of such provisions to other persons and circumstances shall not be affected thereby.

EFFECTIVE DATE

SEC. 17. The foregoing provisions of this Act shall not take effect until accepted by concurrent resolution of the Philippine Legislature or by a convention called for the purpose of passing upon that question as may be provided by the Philippine Legislature.

Approved, March 24, 1934.

INDEX

	Page
Aaland Islands, neutralization of	57
Absolute contraband (*see also* Contraband)	7, 42
Aerial law and maritime law	62
Aerial navigation	64
Convention, 1919	58
Aerial warfare	65
Aggression	76
Aircraft:	
Civil	58
Due diligence as to	63
Hospital	63
In neutral jurisdiction	59, 65, 68
Internment of	67
Licensing of	68
Military, belligerent	60
On board warships	65
Aircraft carriers	65
American Red Cross	25
Amphion, the	101
Argentine Republic	94
Straits of Magellan	86
Armed neutrality, 1780 and 1800	44
Austria, annexation of Cracow	50
Austria-Hungary:	
Belgian neutrality	53
Blockade of Montenegro	36
Balloons, gas for	64
Belgian dependencies, neutralization of	53
Belgium:	
Neutralization and treaties of 1870	51
Neutralization by treaty of 1831	51
Violation of territory of	52, 67
"Besieged, blocked, or invested"	27
Blacklists	38
Black Sea Straits	84

	Page
Blockade	91
Declaration of London	29, 45
Early	28
Notification of	28
Proclaimed during World War	36
Bolivia, war with Paraguay, 1933	94
Brazil:	
Neutrality declaration, 1933	94
Sojourn of belligerent vessels in ports of	69
Treaty with United States, 1928	6
British Empire, maintenance of status quo in Pacific possessions	54
Buena Ventura, the	93
Bynkershoek	79
Canada, Customs Act, 1927	80
Chile:	
Jurisdiction over Straits of Magellan	86
Neutrality decree, 1914	87
Neutrality decree, 1933	94
Civil population:	
Armed forces	19, 26
Mobilization of	27
Commercen, the	27
Commission of Jurists, 1923	
On aerial warfare	64
On aircraft	60, 65, 69
On radio in war	99
Conditional contraband	7, 42, 62
Continuous voyage	21
Contraband:	
Absolute	7, 12, 42
American treaties	6
Conditional	7, 42, 62
Definition of	26
Distinctions between classes of	16, 20, 25
Early attitude toward	2
Lists of, changes during World War	10
Declaration of London	7
Effect of changing conditions on	26, 44
United States' attitude toward	5

Page
Contrabandum ---- 2
Convention of Constantinople, 1888 ---- 56
Cracow, free city of ---- 50
Croft v. *Dunphy* ---- 82
Cunard S. S. Co. v. *Mellon* ---- 80

Dardanelles and Bosphorus ---- 85
Declaration of London ---- 42
Blockade ---- 29, 45
Contraband lists ---- 7, 10
Turco-Italian War, 1911–12 ---- 9
United States attitude toward ---- 10, 31, 34
Declaration of Paris ---- 28, 42
Destination ---- 19, 21, 27, 33
Due diligence ---- 63

Embargoes ---- 37, 38
Enemy destination (*see also* Destination) ---- 4, 35
Enemy origin ---- 35
Export prohibitions ---- 37

Finland, and Aaland Islands ---- 58
Foodstuffs, as contraband ---- 12, 18, 33, 43
France:
Attitude toward exemption of hospital supplies ---- 24
Blockade of Greece ---- 37
Free ships, free goods ---- 5
Fuca's Straits ---- 83

Gentilis ---- 4
Germany:
Attitude toward hydroplanes, 1915 ---- 61
Embargoes, 1914 ---- 39
Government control of foodstuffs during war ---- 19
Ordinance exempting hospital supplies ---- 24
Use of mines in World War ---- 100, 104
Violation of Belgian territory ---- 51, 67
War zone proclamation ---- 17, 41, 104
Great Britain:
Attitude toward exemption of hospital supplies ---- 25
Blockade of the Cameroons ---- 36
Export prohibitions, 1914 and 1915 ---- 38

Great Britain—Continued. Page
On laying of mines by Germany 101
Order in Council, August 20, 1914 31
Order in Council, March 11, 1915 35
Order in Council, February 16, 1917 35
Pact of Paris, and 78
Suggested modifications of Declaration of London 11
Treaty with United States, 1846 83
Grotius 4

Hague Convention, III 94
Making of 97
Hague Convention, V 44
Hague Convention, VIII 99
Hague Convention, XIII 61
Hospital aircraft 63
Hospital supplies, exemption of 23, 24
Hostilities, commencement of 93, 95, 97
Hovering 81
Hydroplanes, as war vessels 61

Institute of International Law:
On commencement of hostilities 93
On declaration of war 97
On straits 84
International law:
Municipal law and 40
Violation of 53, 105
International Law Association 89
Interment 67, 71

Japan:
Blockade of Kiao-Chau 36
Maintenance of status quo in the Pacific 54
Kim, the 20

Lausanne Conference: Régime of Straits 86
League of Nations:
Committee, on territorial waters 88
Council 57
Covenant 76

Page

Limitation of Naval Armament Treaty, 1922 54
Luxemburg, neutralization of 51

Maritime jurisdiction 79
Customs 80
Three-mile limit 57, 80, 90
Six-mile limit 80
Twelve-mile limit 81
Maritime law, and aerial law 62
"Means at its disposal", neutral government 63
Mines, laying of 99
United States proposals regarding 104

Naval bases 54, 56
Neutral jurisdiction, aircraft 59, 63, 65, 68
Neutral rights 32, 44, 102
Retaliation and 41
United States and 14, 30, 42
Neutral trade:
Belligerent restriction of 18
Early restrictions on 3
Interference with 22, 34, 42
Neutral port, sojourn in 69
Neutral waters, seaplanes in 59
Neutrality 43
Neutralization:
Agreements 49
Of Aaland Islands 57
Of Belgium 51
Of Luxemburg 51
Of Panama Canal 56
Of Philippine Islands 49, 54, 70, 123, 139
Of Switzerland 50
Nicaragua 91

Olinde Rodrigues, the 29

Pact of Paris, history of 75
Panama Canal, neutralization of 56
Panama Canal Zone, aircraft in 66
Paper blockades 29, 32
Paraguay, declaration of war with Bolivia, 1933 94
Peru 94

Philippine Islands: Page
American commitments in 55
Independence of 47, 70
Neutralization of 49, 54, 71, 123, 139
United States act to frame constitution for, January 17, 1933 48, 54, 56, 70, 111
United States act to frame constitution for, March 24, 1934 127
Ports, closure of 91
Prohibited areas 3

Radio:
In time of peace 98
In time of war 99, 107
Renunciation of war, treaty for. (*See* Pact of Paris.)
Reprisals 22, 35
Retaliation 39, 41
River, neutral, transit of 45, 95
Russo-Japanese War 67, 85

Sanctions 76
Schücking, Dr 88
Seaplanes 59, 71
Self-defense 78
Seneca 5
Sovereignty 18
Spaight, J. M 68
Status quo, in Pacific area 54
Strained relations 74
Straits 73, 82
Black Sea 3, 84
Closure of 92, 107
Commission of the 85
Dardanelles and Bosphorus 85
Fuca's 83
In peace and war 73
Jurisdiction over 82, 84, 88
League of Nations committee on 88
Of Gibraltar 92
Of Magellan 86
Submarines 104
Suez Canal 56

Switzerland: Page
Control of air space 66
Neutralization of 50

Territorial waters (*see also* Maritime Jurisdiction, Straits)
of Canada 81
Thalweg 89
Three-mile limit. (*See* Maritime jurisdiction.)
Torpedoes 100
Treaty of Sèvres, control of the Straits 85
Treaty of Vienna, 1815 50
Turco-Italian War, 1911–12 9
Turkey and "Straits question" 85
Twenty-four-hour rule 57, 69

Ultimate destination (*see also* Destination) 20
Union of Soviet Socialist Republics, and Pact of Paris 77
United States:
Attitude toward Declaration of London in 1914 10, 31
Attitude toward German mine laying 101
Attitude toward hydroplanes 61
Early attitude toward contraband 5
Maintenance of status quo in Pacific area 54
Philippine independence, act granting:
January 17, 1933 48, 54, 56, 70, 111
March 24, 1934 127
Proclamation regarding aircraft in Panama Canal Zone 66
Proclamation regarding licensing of aircraft 68
Proposal as to use of mines in World War 104
Treaty with Brazil, 1828 6
Treaty with Great Britain, 1846 83
Treaty with Spain, 1898 55
Use of force 96

Vessels:
Neutral 41
War, hydroplane as 61

War (*see also* Hostilities):
Declaration of 92, 94, 97
Distinction between hostilities 98
Of aggression 76

Page
War zone, German proclamation 17, 41, 104
Washington Conference, 1921–22 54
Water boundaries 82
World War:
Aircraft at outbreak of 67
Changes in contraband list 10

Zamora, the 39

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